Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PAMELA JACOBAZZI,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Court Of Appeals For The Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment allows a trial court to weigh evidence of reckless conduct, in rejecting a defendant's request for a jury instruction for Involuntary Manslaughter in a prosecution for First Degree Murder.

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OPINIONS BELOW

On December 27, 2001, the Illinois Court of Appeals for the Second Judicial Circuit issued a Rule 23 Order affirming the Petitioner's Conviction for First Degree Murder and Thirty – Two (32) year Sentence. On February 22, 2002, the Illinois Court of Appeals for the Second Judicial Circuit denied Petitioner's timely filed Petition for Rehearing. The Illinois Supreme Court denied Petitioner's timely filed Petition for Leave to Appeal on May 30, 2002.

STATEMENT OF JURISDICTION

Petitioner, Pamela Jacobazzi, timely filed the instant Petition for Certiorari on or before August 27, 2002. The Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, sec. I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State of wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

720 ILCS 5/9-1(a) (West. 1994).

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause the death to that individual or another; or

(2) he knows that such acts create a strong possibility of death or great bodily harm to that individual or another; or

(3) he is attempting or committing a forcible felony other than second degree murder.

720 ILCS 5/9-3(a) (West. 1994).

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of

death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

STATEMENT OF THE CASE

A. Statement Of Facts.

In the instant case, a jury found the Petitioner, Pamela Jacobazzi guilty of first degree murder because it found that Ms. Jacobazzi "intentionally" committed acts that created a strong possibility of resulting in death or serious bodily injury, and that caused the death of Matthew Czapski. The facts underlying the murder charge were finalized on December 19, 1995, when 2½ year old Matthew Czapski passed away from complications from the injuries he allegedly suffered on August 11, 1994.

Prior to August 11, 1994, Ms. Jacobazzi was a mother of one son, who lived with her son and "common law husband" in Bartlett, Illinois, and operated a day-care service from her home. During July and August of 1994, Ms. Jacobazzi cared for two toddlers in addition to her son and Matthew Czapski. Matthew began Ms. Jacobazzi's day care program on August 1, 1994, just ten days prior to the alleged incident.

On August 11, 1994, Matthew Czapski's mother picked him up from Ms. Jacobazzi's home shortly after 5:00 p.m., and began to drive him to his natural father's house. While en route, Matthew Czapski's mother noticed that she could not wake him. Matthew Czapski's mother continued to the father's house where she and the father attempted to wake Matthew Czapski while on the father's driveway. After the efforts of Matthew's parents on the driveway of the father's house to wake him failed, they

took him to the emergency room at St. Joseph's Hospital, located in Elgin, Illinois. The Emergency Room staff attempted to stabilize Matthew, and he was airlifted to Lutheran General Hospital, located in Park Ridge, Illinois.

Based on the results of a CT Scan taken that day, the working diagnosis for Matthew Czapski at Lutheran General Hospital was "Shaken Baby Syndrome," the staff at Lutheran General Hospital performed no additional investigation into the cause of Matthew Czapski's injuries. Instead, the staff at Lutheran General Hospital attempted to treat Matthew's life-threatening intracranial hemorrhage based on the assumption that he had been shaken. Part of said medical treatment included an emergency craniotomy by Dr. Jerry Bauer to relieve the pressure within Matthew Czapski's brain. However, even after said craniotomy, Matthew Czapski's medical records indicate that he continued to suffer from intracranial bleeding. At no time did the staff of Lutheran General Hospital, or any of Matthew Czapski's medical providers consider or investigate a cause of the injuries other than "Shaken Baby Syndrome."

Matthew Czapski was released from Lutheran General Hospital in August 1994, while still suffering from the effects of his injury. Said effects included continued intracranial bleeding. Matthew Czapski lived for approximately 1½ years after his release from Lutheran General Hospital, but was re-admitted for "complications" in December of 1995. Matthew Czapski passed away on December 19, 1995. An autopsy was performed by the Cook County Medical Examiner's Office after Matthew Czapski's body had been embalmed. The pathologist's report indicated that the cause of death was "subdural hematoma due to trauma."

The prosecution's theory at trial was that Matthew Czapski's fatal injuries were due to the Shaken Baby Syndrome that he suffered at the hands of Ms. Jacobazzi at some point late in the afternoon of August 11, 1994. However, despite the fact that three other children were present with Ms. Jacobazzi and Matthew Czapski on the day in question, the prosecution introduced no direct evidence that Ms. Jacobazzi either shook or otherwise mistreated Matthew Czapski on August 11, 1994, and no motive for Ms. Jacobazzi to have done so. Instead, the prosecution's case was a largely circumstantial case, consisting of numerous "expert witnesses" who described the cause of Shaken Baby Syndrome.

The prosecution called nine medical expert witnesses to support its theory of Shaken Baby Syndrome. In sum, the prosecution's medical theory of the case at trial was that Matthew Czapski's injuries were the result of a violent shaking by Ms. Jacobazzi (i.e. Shaken Baby Syndrome), which had to have occurred sometime between two and twelve hours before he was taken to the St. Joseph's Hospital Emergency Room. The prosecution further theorized that due to this time frame and the nature of Matthew Czapski's injuries, the fatal injury could not have been the result of a slow internal bleed or the lump on his head he suffered on August 8, 1994.

After the denial of her motion for directed verdict, Ms. Jacobazzi called the neurologist who first reviewed Matthew's CT Scans that had been taken on August 11, 1994, and who testified that said CT Scans revealed a large subdural hematoma on the left side of the brain, which contained ***both new and old blood***, and massive intracranial swelling from a severe head trauma. The neurologist also testified that the old blood could have been 10 to 14 days old.

Ms. Jacobazzi then called a character witness to testify as to her reputation as a truthful, law abiding and peaceful person; along with her mother to testify that she observed an unharmed and awake Matthew Czapski with Ms. Jacobazzi and the other children at approximately 3:15 p.m. to 4:00 p.m. on August 11, 1994. Ms. Jacobazzi then called her medical expert witness, Dr. Jan Leestma. Dr. Leestma is a neuropathologist and the Associate Medical Director of the Chicago Institute of Neurosurgery and Neuroresearch. In short, Dr. Leestma's testimony was that the slide of Matthew Czapski's brain revealed both old and new blood which indicated that his injuries could have been caused by a mechanism other than shaking and which were indicative of an "old" injury.

Ms. Jacobazzi then testified on her own behalf and provided information concerning her personal background and the other children enrolled in her day care on August 1, 1994. Ms. Jacobazzi described how Matthew Czapski bumped his head on August 8, 1994, while he was sitting in her kitchen. Ms. Jacobazzi also testified that Matthew Czapski was not at day care on August 10, 1994 because he had a fever. Thereafter, Ms. Jacobazzi testified to the events of August 11, 1994, in which she denied either noticing anything unusual about Matthew Czapski, or shaking him. Ms. Jacobazzi also testified concerning her various interrogations by the Bartlett Police Department.

In response to Ms. Jacobazzi's testimony about said interrogations, the prosecution introduced evidence that Ms. Jacobazzi admitted to tumbling and allowing Matthew Czapski to do somersaults while in her care on August 11, 1994.

As part of their rebuttal case, the prosecution also called Dr. Robert Kirschner, who was a forensic pathologist, to contradict Dr. Leetsma's testimony concerning an old injury as the cause of the subdural hematoma.

After, closing argument, the trial court refused Ms. Jacobazzi's request to submit an involuntary manslaughter instruction to the jury because she denied any conduct which could have caused Matthew Czapski's injuries. (App. *infra*, pp. 100-09). The relevant instruction submitted to the jury concerning the element of knowledge and the charge of First Degree Murder provided as follows:

> A person acts knowingly with regard to the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such a nature or that such circumstances exist. Knowledge of a material fact includes awareness of a substantial probability that such fact exists.
>
> A person acts knowingly with regard to the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct.
>
> A person commits the offense of first degree murder when she kills an individual in performing the acts which caused the death, she knows that such acts create a strong probability of death or great bodily harm to that individual.
>
> To sustain the charge of first degree murder, that State must prove the following propositions:
>
> First proposition, that the defendant performed the acts which caused the death of Matthew Czapski; and,

> Second proposition, that when the defendant did so, she knew that her acts created a strong probability of death or great bodily harm to Matthew Czapski.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

(App. *infra*, pp. 100-09).

Thereafter, the jury returned a verdict of guilty to First Degree Murder.

B. How The Question Was Presented.

After the close of evidence on May 14, 1999, Ms. Jacobazzi submitted a proposed jury instruction for involuntary manslaughter. (App. *infra*, pp. 100, 111-13). After summarizing its recollection of the evidence and testimony presented at trial, the trial court indicated that it did not believe that Ms. Jacobazzi would be entitled to have an involuntary manslaughter instruction submitted to the jury because Ms. Jacobazzi had denied committing any act which might have caused the fatal injury, and all of the evidence of recklessness was submitted through the prosecution's witnesses. (App. *infra*, pp. 100-03). Thereafter, the issue was continued to May 18, 1999. (App. *infra*, p. 103).

On May 18, 1999, at the jury instruction conference, the trial re-visited Ms. Jacobazzi's request for an involuntary manslaughter instruction. (App. *infra*, pp. 105-11). Ms. Jacobazzi argued generally that she was entitled to the involuntary manslaughter instruction because the prosecution introduced evidence of recklessness that could have

been the cause of the fatal injury. (App. *infra,* pp. 106-09). Ms. Jacobazzi further asserted that the source of the evidence was irrelevant as was the fact that she denied the alleged reckless conduct at trial. (App. *infra,* pp. 108-09). Thereafter, the prosecution's argument against submitting the involuntary manslaughter instruction was based solely on Ms. Jacobazzi's denying the alleged reckless conduct which might have caused the fatal injury. (App. *infra*, p. 109). Based on the prosecution's argument, the trial judge refused to submit the involuntary manslaughter instruction to the jury. (App. *infra*, p. 109).

SUMMARY OF ARGUMENT

The Illinois Supreme Court erred when it denied Petitioner, Pamela Jacobazzi's, Petition for Leave to Appeal because the Illinois Court of Appeals incorrectly rejected Petitioner's argument that due process prohibits a trial court from weighing evidence of reckless conduct introduced at trial when rejecting a defendant's request for a jury instruction for involuntary manslaughter in a prosecution for First Degree Murder and Aggravated Battery. Said decision should be reversed because the Sixth and Fourteenth Amendment rights to Due Process and Trial by Jury require that a jury instruction for reckless homicide be submitted to the jury in a prosecution for First Degree Murder if there exists any evidence, however slight, that would support a verdict for Involuntary Manslaughter. A trial court cannot avoid the above requirement by weighing said evidence, and making a judicial finding, as a matter of law, that said evidence would not support a conviction for the lesser offense.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS AND THE RIGHT TO TRIAL BY A JURY REQUIRE THAT THE TRIAL COURT SUBMIT A JURY INSTRUCTION FOR INVOLUNTARY HOMICIDE WHEN ANY EVIDENCE, HOWEVER SLIGHT, THAT WOULD SUPPORT A VERDICT OF THE LESSER INCLUDED OFFENSE WAS INTRODUCED AT TRIAL

This Court has acknowledged on several occasions that the principle that a defendant is entitled to have the jury instructed as to a lesser included offense if any evidence of the lesser included offense is produced at trial has its roots in the common law. *Beck v. Alabama*, 447 U.S. 625, 633-34, 100 S.Ct. 2382, 2387-88 (1980); *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995 (1973); *see also, Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839 (1896). While this principle was originally developed as an aid to the prosecution, it has long been recognized as beneficial to the defendant because it affords the jury a less dramatic alternative than the choice between conviction of the offense charged an acquittal by providing the jury with a "third option" of convicting on a lesser included offense. *Beck*, 447 U.S. at 633, 100 S.Ct. at 2387-88. This "third option" "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Id.*, *referring to Keeble*, 412 U.S. at 208, 93 S.Ct. at 1995. In *Keeble*, the Court explained the necessity of the "third option" afforded by instructing the jury as to the lesser included offense, as follows:

> [i]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a

defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged [assault with intent to commit great bodily injury], but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option – convicting the defendant of simple assault – could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions. *Keeble*, 412 U.S. at 212-13, 93 S.Ct. at 1997-98 (emphasis in original).

Next, state courts have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence so warrants.[1] Consequently, due process and the right to a trial by jury require a trial court to submit a jury instruction for a lesser included offense if

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[1] *Christie v. State*, 580 P.2d 310 (Alaska 1978); *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *People v. Preston*, 9 Cal.3d 308, 107 Cal.Rptr. 300, 508 P.2d 300 (1973); *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976); *State v. Brown*, 173 Conn. 254, 377 A.2d 268 (1977); *Matthews v. State*, 310 A.2d 645 (Del.1973); *State v. Terry*, 336 So.2d 65 (Fla.1976); *Loury v. State*, 147 Ga.App.152, 248 S.E.2d 291 (1978); *People v. DeVincenzo*, 183 Ill.2d at 239, 700 N.E.2d at 981 (1998); *Pruitt v. State*, 269 Ind.559, 382 N.E.2d 150 (1978); *State v. Millspaugh*, 257 N.W.2d 513 (Iowa 1977); *State v. White*, 225 Kan. 87, 587 P.2d 1259 (1978); *Martin v. Commonwealth*, 571 S.W.2d 613 (Ky. 1978); *State v. Carmichael*, 405 A.2d 732 (Me. 1979); *Blackwell v. State*, 278 Md. 466, 365 A.2d 545 (1976), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2183 (1976); *Commonwealth v. Santo*, 375 Mass. 299, 376 N.E.2d 866 (1978); *People v. Cornell*, 395 Mich. 379, 646 N.W.2d 127 (2002); *Jackson v. State*, 337 So.2d 1242 (Miss. 1976); *State v. Stone*, 571 S.W.2d 486 (Mo.App.1978); *State v. Ostwald*, 180 Mont. 530, 591 P.2d 646 (1979); *State v. Hagwood*, 202 Neb. 379, 275 N.W.2d 605 (1979); *Colle v. State*, 85 Nev. 289, 454 P.2d 21 (1969); *State v. Boone*, 119 N.H. 594, 406 A.2d 113 (1979); *State v. Saulnier*, 63 N.J. 199, 306 A.2d 67 (1973); *State v. Aubrey*, 91 N.M. 1, 569 P.2d 411 (1977); *People v. Henderson*, 41 N.Y.2d 233, 391 N.Y.S.2d 563, 359 N.E.2d 1357 (1976); *State v. Drumgold*, 297 N.C. 267, 254 S.E.2d 531 (1979); *State v. Piper*, 261 N.W.2d 650 (N.D. 1977); *State v. Kilby*, 50 Ohio St.2d 21, 361 N.W.2d 1336 (1977); *Gilbreath v. State*, 555 P.2d 69 (Okl.Cr.App. 1976); *State v. Thayer*, 32 Or.App. 193, 573 P.2d 758 (1978); *Commonwealth v. Terrell*, 482 Pa. 303, 393 A.2d 1117 (1978); *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976); *State v. Grimes*, 90 S.D. 43, 237 N.W.2d 900 (1976); *Howard v. State*, 578 S.W.2d 83 (Tenn. 1979); *Day v. State*, 532 S.W.2d 302 (Tex.Cr.App. 1975); *State v. Gillian*, 23 Utah 2d 372, 463 P.2d 811 (1970); *Painter v. Commonwealth*, 210 Va. 360, 171 S.E.2d 166 (1969); *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978); *State v. Davis*, 205 W.Va. 569, 519 S.E.2d 852 (1999); *Leach v. State*, 83 Wis.2d 199, 265 N.W.2d 495 (1978); *Jones v. State*, 580 P.2d 1150 (Wyo. 1978).

any evidence, however slight, is presented at trial which could support such a finding.

In the instant case, Ms. Jacobazzi sought a jury instruction for involuntary manslaughter in a case where she was charged with first degree murder. Illinois courts have long held that involuntary manslaughter is a lesser included offense of murder. *People v. DiVincenzo,* 183 Ill.2d 239, 249, 700 N.E.2d 981, 987 (1998); *People v. Jones,* 175 Ill.2d 126, 132, 676 N.E.2d 646, 649 (1997); *People v. Ryan,* 9 Ill.2d 467, 475-76, 138 N.E.2d 516, 521 (1956); *People v. Guthrie,* 123 Ill.App.2d 407, 412, 258 N.E.2d 802, 805 (1st Dist. 1970). As such, due process and the right to a trial by jury requires that the jury receive an involuntary manslaughter instruction if ***any*** evidence, however slight, exists to support that instruction. *Id.* In making this determination, "the court's role is to determine whether there is ***any*** evidence supporting that theory, ***it is not the court's role to weigh the evidence.***" *Id.* (emphasis added). In this regard, ***recklessness is a question of fact*** to be decided under all the circumstances by the jury. *People v. Robinson,* 163 Ill.App.3d 754 (1st Dist. 1987) (emphasis added). Furthermore, Illinois courts have held that a jury instruction must be submitted even if the defendant denies the conduct if there exists any factual evidence to support it. In *People v. Rodriguez,* 96 Ill.App.3d 431, 421 N.E.2d 323 (1st Dist. 1981), the Court found reversible error because the trial court failed to instruct the jury as to the issue of self-defense even though defendants denied having any contact with the victim. The *Rodriguez* court specifically rejected the argument that the defendants were not entitled to a self-defense instruction because they did not admit to hitting the victim, and concluded that "***a defendant is entitled to the benefit of***

any defense shown by the evidence, even if the facts on which such defenses are based are inconsistent with the defendant's own testimony. *Id.* at 96 Ill.App.3d 431, 421 N.E.2d at 326 (emphasis added).

Initially, Ms. Jacobazzi asserts that the evidence at trial was sufficient to constitute "slight evidence" of recklessness and the mental state which constitutes Involuntary Manslaughter. In this regard, both Detective Joseph Leonis and Cynthia Czapski testified that on the day of the alleged fatal injury, Matthew Czapski had been tumbling and rolling while in the care and custody of Ms. Jacobazzi. Next, the prosecution attempted to discount the evidence of recklessness by introducing a series of scenarios to both Dr. Quaid and Dr. Alexander as to whether it was possible that Matthew Czapski could have sustained his injuries as a result of either falling from a standing position; tumbling; dancing; doing somersaults; stopping quickly in a car; being bounced on a knee; being dropped from someone's arms and then caught in the air; or from being tripped by another child. The prosecution also spent a significant portion of their closing arguments attempting to discredit the inference of reckless conduct. (App. *infra*, pp. 114-26).

Most importantly, the prosecution introduced no evidence that Ms. Jacobazzi knew her alleged [undescribed manner of] shaking Matthew Czapski created a ***strong probability*** of death or great bodily harm as required by Sec. 9-1(a)(2) of the Illinois Criminal Code. (720 ILCS 5/9-1(a)(2) (West 1994)) (emphasis added). Instead, the only evidence at trial was that Ms. Jacobazzi was made aware via pamphlets and books received in classes for day care providers presented by the Illinois Department of Children

and Family Services only "that shaking a baby ***could*** inflict great bodily harm or death." (App. *infra*, pp. 130-31) (emphasis added). Specifically, the following exchange took place as Ms. Jacobazzi was being cross-examined at trial:

BY MS. RADOSTITS:

Q. So you're only aware of one license then, is that right?

A. Yes.

Q. You're not aware of any other license issued by the Department of Children and Family Services in regards to you watching children?

A. No.

Q. Tell the ladies and gentlemen some of the classes that you take and that DCFS has offered you that enables you to watch children.

A. The classes that are required are like pamphlets and books to read up on that the child – the Children and Family Services provide you with. Also there's special meetings that you can attend to that also have child development, and there's meetings that you can also attend.

Q. Did you attend meetings?

A. Yes.

Q. Did you go to the classes?

A. Some of them.

Q. You received pamphlets in the mail from DCFS?

A. Yes.

Q. Did you read the pamphlets?

A. Yes.

Q. Some of the pamphlets said never shake a baby, didn't they?

A. I don't recall that one, but yes, should have had one with –

Q. Should have had one that said never shake a baby because you know –

A. Right

Q. – that shaking a baby ***could*** inflict great bodily harm or death, right?

A. Yes.

(App. *infra*, pp. 130-31).

The above illustrates that the only evidence presented at trial concerning Ms. Jacobazzi's knowledge as to the ***degree of the possibility*** of death or serious bodily harm that existed from shaking a baby.

In Illinois, one commits Involuntary Manslaughter when she recklessly performs acts that are ***likely*** to cause death or great bodily harm to another. (720 ILCS 5/9-3(a) (West. 1994) (emphasis added). In *DiVincenzo*, the Illinois Supreme Court reversed a defendant's murder conviction because the trial court failed to submit an Involuntary Manslaughter instruction to the jury. (183 Ill.2d at 239, 700 N.E.2d at 981). In *DiVincenzo*, the defendant and the victim engaged in a physical altercation whereby the defendant continued to punch and kick the victim on the head after the victim had been knocked to the ground.

Unknown to the defendant, the victim had a rare medical condition which made him more susceptible to sudden, severe traumatic brain injury. The victim ultimately died from the brain injuries suffered in the altercation. However, the Illinois Supreme Court noted that the cause of the death was the effect that the blows to the head had on the victim's rare medical condition, and held as follows:

> [b]ased on the evidence, the jury could reasonably have concluded that defendant, by punching and kicking the victim, consciously disregarded a substantial and unjustifiable risk of death or great bodily harm but did not have the mental state required for first degree murder. (*Id.* at 252, 700 N.E.2d at 988).

In the instant case, the prosecution merely presented evidence that Ms. Jacobazzi was told that shaking a baby ***could*** cause great bodily harm or death. (App. *infra*, pp. 130-31). While Ms. Jacobazzi asserts that said proof is not sufficient to establish the element that she knew that shaking an infant created a ***strong probability*** of death or great bodily harm as required by Sec. 9-1(a)(2) of the Illinois Criminal Code; it is at least proof of ***some evidence*** that could lead a jury to find her guilty of Involuntary Manslaughter.

Next, the trial court erred in rejecting Appellant's tendered additional manslaughter instruction because its ruling was improperly based on the fact that Ms. Jacobazzi denied doing anything to Matthew Czapski to cause his injuries. (App. *infra*, pp. 100-09). Such a basis for excluding said jury instruction was improper because it invaded the province of the jury by considering the weight

and credibility of the trial evidence. *People v. Dowdy*, 21 Ill.App.3d 821, 316 N.E.2d 33 (1st Dist. 1974); *see also*, *Rodriguez*, 96 Ill.App.3d at 431; 421 N.E.2d at 326.

Based on the above, Ms. Jacobazzi asserts that there existed "some" evidence of contact that could allow a jury to find her guilty of the lesser included offense of involuntary manslaughter. As such, Ms. Jacobazzi was entitled to an involuntary manslaughter instruction. In this regard, the public policy for providing the jury with the "third option" of a lesser included offense is directly applicable to the instant case. Here, the jury was faced with a tragic case where a toddler unexpectedly died, allegedly as the result of "Shaken Baby Syndrome." The alleged perpetrator was Ms. Jacobazzi who was the victim's daycare provider. The prosecution's case was largely circumstantial, and the jury was provided with no direct evidence that Ms. Jacobazzi shook Matthew Czapski. However, the evidence presented at trial was overwhelming that "something" happened to the child when it was in Ms. Jacobazzi's care. Consequently, the jury was left with only two options: (1) convicting the petitioner of first degree murder, or (2) acquitting her outright. *See Keeble*, 412 U.S. at 212-13, 93 S.Ct. at 1997-98. It is especially noteworthy that the May 14, 1997, Grand Jury, when faced with the decision as to whether to return a bill of indictment for first degree murder, felt that the evidence warranted a lesser offense. In this regard, the following exchange took place:

> [THE JUROR]: I have a question for you, the State's Attorney's Office. Why are you seeking first degree murder charges rather than a lesser charge, and a related question, if we were to

deny first degree murder charges, could you then seek lesser charges.

[Ms. MASTERS]: With regard to our choice of what to charge, we felt that based on the nature of the injuries, that this was the most appropriate charge. Now, if you were to return a no bill, I'm not quite sure how that affects the procedure, if I could come back and ask for something less.

[THE JUROR]: You don't know that?

[Ms. MASTERS]: I mean, I suppose before you were to – I suppose I would like to know whether you were – if you required further testimony, I could do that.

[THE JUROR]: ***I'm asking that because I think maybe you – I think first degree murder is inappropriate because it requires intent and there isn't any proof of intent, but some other charges might be more appropriate. That's why I bring it up. I couldn't support a first degree murder charge on this. I think it is the wrong charge, but obviously there is a crime.***

(App. *infra*, pp. 130-32).

Ms. Jacobazzi notes that the grand juror's feeling that the evidence warranted a lesser charge than murder is indicative of the reasonableness that a juror could have found at least slight evidence of recklessness in this matter. Furthermore, the instant case, provides a stark example of this Court's warning in *Keeble* that "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." It is this

fundamental unfairness that the requirement of the lesser included instruction seeks to avoid.

II. THE TRIAL COURT AND APPELLATE COURT ERRED WHEN THEY WEIGHED THE EVIDENCE OF RECKLESSNESS IN REJECTING PETITIONER'S ARGUMENT THAT SHE WAS ENTITLED TO SUBMIT A RECKLESS HOMICIDE JURY INSTRUCTION

For over one hundred years, this Court has held to the following principles: (1) that evidence of a lesser included offense need not be sufficient to outweigh the more serious included offense to require the submission of a jury instruction for the lesser included offense to the jury; and (2) a trial court cannot weigh the evidence of the lesser included offense with that of the greater offense in determining whether to submit a jury instruction for the lesser included offense to the jury. In cases involving the submission of a manslaughter instruction in a case where the defendant is charged with murder, this Court has stated as follows:

> [t]he evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder.

* * *

> The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.

Stevenson, 162 U.S. at 314-15, 16 S.Ct. at 839. The *Stevenson* Court also provided guidance concerning the prohibition of a trial court weighing evidence at trial, when it further stated as follows:

> [a] judge may be entirely satisfied, from the whole evidence in the case, that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter. *Id.* at 323, 16 S.Ct. at 843.

In rejecting Ms. Jacobazzi's argument that she was entitled to have a jury instruction for the lesser included offense of Involuntary Manslaughter, the Appellate Court incorrectly considered the medical evidence, defense theory, and prosecution "fact" evidence separately from

one another.[2] Instead, the Appellate Court should have considered all evidence as a whole and determined whether sufficient evidence existed to warrant an involuntary manslaughter instruction. See *People v. Garcia*, 188 Ill.2d 265, 721 N.E.2d 574 (1999); *DiVincenzo*, 183 Ill.2d at 250-51, 700 N.E.2d at 987-88; *People v. Joyner,* 50 Ill.2d 302, 306-7, 278 N.E.2d 756 (1972). Thereafter, the Appellate Court further erred when it improperly weighed the evidence in the record, holding that evidence supporting reckless conduct was not credible. (App. *infra*, pp. 72-75). In fact, the ***Appellate Court acknowledged the existence of some evidence of recklessness*** when it stated, "the only medical expert who testified that the victim's injuries could have occurred outside this time frame, was thoroughly impeached with prior inconsistent statements that supported the prosecution's theory of the case." (App. *infra*, pp. 72-75). However, the fact that Ms. Jacobazzi's medical expert may have been impeached goes only to the weight of his testimony, not its existence. *People v. Bradford*, 106 Ill.2d 492, 478 N.E.2d 1341 (1985); *see also* Illinois Pattern Jury Instruction (IPI), Criminal, No. 3.11 (2000 ed.) (App. *infra*, pp. 133-34). It is well established that evidence may not be disregarded as inherently improbable unless it is of a "physical impossibility," *Chicago City Ry. Company v. Hagenback*, 228 Ill. 290, 294, 81 N.E. 1014 (1907). However, "if a statement is merely inconsistent with reasonable probabilities," the court may ***not*** simply reject that testimony. *Id.*; see also *Jones v.*

[2] App. *infra*, pp. 72-75 (holding "medical testimony, standing alone, accorded no middle ground to the cause of the victim's injuries").

Consolidation Coal Company, 174 Ill.App.3d 38, 44, 528 N.E.2d 33 (5th Dist. 1988).

In the instant case, Dr. Leetsma testified that the CT scan showed a moderate-sized subdural hematoma, which had continually bled from its inception, at which it contained "fresh blood" about two days old, older blood, and evidence of healing, from an injury approximately ten (10) days old. In light of the above findings, Dr. Leetsma testified that symptoms similar to those suffered by the victim can and do "appear out of nowhere," and be delayed until the cerebrospinal fluid is pushed out of the brain, as in the victim's case. Dr. Leetsma next testified that while retinal hemorrhages are often associated with Shaken Baby Syndrome, they can also result from other related causes. Dr. Leestma further noted that the absence of grip marks on the victim in this case led him to believe that this was not a case of Shaken Baby Syndrome. While Dr. Leetsma allowed that the victim's injuries were common to those suffered in "shaken baby" cases, he did not believe there was sufficient evidence from which he could draw a conclusion based on a firm scientific basis that the victim had suffered from Shaken Baby Syndrome. Thereafter, Dr. Leetsma opined that the victim's fall on August 8th could have aggravated an existing injury or condition that could have been slowly bleeding. During cross-examination, the Prosecution contradicted Dr. Leetsma extensively regarding admissions and possible contradictions found in his child abuse writings. In their rebuttal case, the prosecution used Dr. Kirschner to *contradict* Dr. Leetsma's testimony. Dr. Kirschner testified that Dr. Leestma's opinion was not consistent with the victim's medical records and injuries, and further testified that Matthew's injuries were clearly those of shaken baby syndrome, and were not

related to any preexisting injury. Dr. Kirschner opined that the victim's injuries were suffered due to a violent back and forth shaking that caused a significant movement in his head tearing the bridging veins, causing swelling of the brain and hemorrhages in his retina, and the injuries were not caused by intracranial pressure, cardiopulmonary resuscitation, or slow bleeding. Further, in response to Dr. Leetsma's testimony, Dr. Kirschner testified that he had only observed grip marks on children who were shaken about half of the time.

In light of the above, Dr. Leetsma's opinion was not completely contradictory to common sense or the laws of nature. In fact, Dr. Leestma and Dr. Kirschner's testimony merely contradicted each other. At most, the "impeachment" by Dr. Kirschner established that Dr. Leetsma's theory as to the origin of the fatal injury was "merely inconsistent with reasonable probabilities." As such, it was improper for the trial and Appellate Courts to simply reject the existence of Dr. Leetsma's opinion which provided some evidence of reckless conduct which required the submission on Involuntary Manslaughter jury instruction. *Hagenback*, 228 Ill. at 294; *Jones*, 174 Ill.App.3d at 44. This improper weighing of evidence by the court constitutes reversible error. *People v. Dowdy*, 21 Ill.App.3d at 821, 826 (1st Dist. 1974).

Furthermore, Dr. Leetsma's testimony was but only one source of evidence which raised the possibility of reckless conduct on Ms. Jacobazzi's part. The record is replete with testimony presented by the prosecution which constitutes slight evidence of recklessness that required an involuntary manslaughter instruction. The prosecution presented evidence through both Detective Joseph Leonis and Cynthia Czapski that on August 11, 1994, Matthew

Czapski had been tumbling and rolling while at Petitioner's day care. The prosecution also spent a significant portion of their closing arguments attempting to discredit the inference of reckless conduct. Finally, it is noteworthy that at least one Grand Juror felt that the evidence warranted a lesser offense. (App. *infra*, pp. 130-32). The above clearly constitutes conduct sufficient to require an involuntary manslaughter instruction. *DiVincenzo*, 183 Ill.2d at 250-51; 700 N.E.2d at 987.

However, the Appellate Court departed from the *DiVincenzo* analysis when it held, as a matter of law, that the above conduct does not constitute reckless conduct. (App. *infra*, pp. 71-77). In so doing, the court below misapprehended the applicability of *People v. Coleman*, 311 Ill.App.3d 467 (1st Dist. 2000), and *People v. Ripley*, 291 Ill.App.3d 565 (3rd Dist. 1997), to support its assertion that the medical evidence in the instant case concerning shaking a baby would establish "knowing" rather than "reckless" conduct. (App. *infra*, p. 75). Neither of the above cases addressed the issue of whether a Defendant in such a case was entitled to a jury instruction for involuntary manslaughter, and are thus, not applicable. *Coleman,* 311 Ill.App.3d at 346 (addressing only whether the prosecution met its burden of proof in convicting Petitioner for first degree murder in a shaken baby case); *Ripley*, 291 Ill.App.3d at 565 (addressing whether the prosecution met its burden in convicting a defendant for Aggravated Battery arising out of the defendant's shaking a baby where no issue exists as to a lesser included offense involving reckless conduct). Furthermore, the Appellate

Court also misapprehended the applicability[3] of *People v. Buckley*, 282 Ill.App.3d 81 (3rd Dist. 1996), to the instant case, because the *Buckley* case involved an analysis of improper comments during the prosecution's closing argument, which incorrectly defined the requisite mental state prosecution required for involuntary manslaughter. However, the *Buckley* court did not define whether certain conduct constituted accidental, careless, or negligent conduct, as opposed to reckless conduct, as a matter of law. Finally, the Appellate Court's blind application of the *Coleman*, *Ripley*, and *Buckley* opinions is contrary in the instant case because the only evidence of Ms. Jacobazzi's knowledge as to the degree of harm that could be caused was that shaking a baby "***could***" cause serious bodily injury, or death (See infra.).

Consequently, this Court should find that the Appellate Court's analysis was improper, and that the trial court's failure to grant Ms. Jacobazzi's request that an Involuntary Manslaughter instruction be submitted to the jury violated Ms. Jacobazzi's Sixth and Fourteenth Amendment rights to a trial by jury and due process, constituted reversible error, and requires that Ms. Jacobazzi's conviction and sentence be set aside.

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[3] App. *infra*, pp. 77-78.

CONCLUSION

This Court should grant the instant Petition for Writ of Certiorari because the Sixth and Fourteenth Amendments, as set forth above, require that a trial court submit an Involuntary Manslaughter jury instruction in a prosecution of First Degree Murder where there exists any evidence of reckless conduct, and further prohibits the trial court from evaluating the weight of evidence of reckless conduct in ruling, as a matter of law, that said evidence is not sufficient to warrant the submission of an Involuntary Manslaughter jury instruction.

Respectfully submitted,

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APPENDIX A

This Order Is Not Precedential
And Is Not To Be Cited

No. 2-00-0523

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PAMELA JACOBAZZI, Defendant-Appellant.	Appeal from the Circuit Court of Du Page County. No. 95-CF-1160 Honorable Ronald B. Mehling, Judge, Presiding.

RULE 23 ORDER

(Filed Dec. 27, 2001)

Following a jury trial, defendant, Pamela Jacobazzi, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1994)) for the alleged death of the victim, Matthew C., from "shaken baby syndrome." The trial court sentenced defendant to 32 years' imprisonment. Defendant timely appeals contending: (1) the State committed prosecutorial misconduct at a pretrial suppression hearing when it impeached defendant with privileged notes improperly disclosed by her attorney; (2) the trial court erred when it denied her motion to suppress; (3) the State improperly introduced evidence of defendant's assertion of her right to counsel; (4) the State improperly introduced

evidence of her postarrest silence; (5) the trial court erred when it admitted evidence and photographs of the victim's autopsy; (6) the State improperly introduced other irrelevant evidence; (7) the trial court erred when it instructed the jury regarding its ruling on the motion to suppress; (8) the State committed a *Brady* violation when it failed to turn over notes written by a witness during trial; (9) the State made improper prejudicial comments during its closing argument; (10) the trial court erred when it refused defendant's involuntary manslaughter instruction; (11) the State failed to prove her guilty beyond a reasonable doubt; and (12) she was denied the effective assistance of counsel. We affirm.

BACKGROUND

Indictments

On May 31, 1995, defendant was charged in a three count indictment with aggravated battery to a child (720 ILCS 5/12-4.3(a) (West 1994) aggravated battery (720 ILCS 5/12-4 (a) (West 1994) and battery (720 ILCS 5/12-3(a) (West 1994) Each count alleged that defendant injured the victim by shaking him. On May 15, 1997, the grand jury returned an indictment with four additional counts of first-degree murder (720 ILCS 9-1(a)(1), (a) (2) (West 1994)). The various counts of the indictment alleged that defendant shook the victim (1) with the intent to do great bodily harm, (2) knowing her acts would cause his death, (3) knowing her acts created a strong probability of great bodily harm, and (4) knowing her acts created a strong probability of death.

Pretrial Proceedings

On June 7, 1995, attorney Louis Elovitz filed an appearance on defendant's behalf. On June 8, 1995, the trial court ordered the State to make the disclosures required by Supreme Court Rules 412(a), (b), and (c) (134 Ill. 2d Rs. 412(a), (b), (c)) and defendant to make the disclosures required by Supreme Court Rules 413(c) and (d) (134 Ill. 2d Rs. 413(c), (d)). The cause was continued several times, and the trial court ruled that the speedy-trial term was tolled during several continuances. On December 11, 1995, attorney Elovitz filed a disclosure statement for defendant. On December 28, 1995, attorney Elovitz moved to continue the trial and withdrew defendant's speedy trial demand. On January 26, 1995, attorney Elovitz supplemented the earlier disclosure statement,

On March 21, 1996, the trial court granted attorney Elovitz leave to withdraw and granted attorney Anthony Montemurro leave to file an appearance as substitute counsel. On June 26, 1996, attorney Montemurro filed a motion to suppress statements allegedly made by defendant to the police. The motion alleged that defendant had not been given the warnings required by *Miranda* and her waiver was not knowing and involuntary. The State filed a motion to strike defendant's motion to suppress arguing that its allegations were conclusory. The cause was continued several times and on September 18, 1997, defense counsel filed an amended motion to suppress. The amended motion contained allegations substantially similar to the original motion.

On September 18, 1997, the trial court commenced a hearing on defendant's amended motion to suppress. Joseph Leonas, a Bartlett police officer, testified for the

State. On August 12, 1994, he was assigned to investigate a report of child neglect involving the victim. Leonas contacted the victim's mother and learned that defendant had watched the victim on the day he was injured. Leonas contacted every other individual who also had contact with the victim that day. On August 12, Leonas spoke with defendant at her home in Bartlett. Leonas and his supervisor, Sergeant Nichols, arrived at the house at approximately 5 p.m. and stayed for approximately 45 minutes. Leonas testified that there was "not really" a criminal investigation at that time and he never indicated that defendant was under arrest.

Leonas further testified that on August 15, 1994, he learned that the victim's injuries were the result of shaken baby syndrome. Because of this new information, Leonas reinterveiwed everyone who had contact with the victim. On August 19, 1994, Leonas contacted defendant by telephone and they agreed to meet at 7 p.m. at the Bartlett police station because the time was mutually convenient. Leonas did not know how defendant arrived at the station but she was not transported there by the police. They met in the lobby, she was not handcuffed, and Leonas did not tell her she was under arrest. Leonas walked with defendant to an interview room in the youth section.

Leonas testified that the dimensions of the room were approximately eight feet by eight feet. A table and chairs were in the room. The room had a door but the door did not have a lock. Leonas, defendant, and another officer, Sergeant Williams had a conversation in the room. The conversation lasted approximately three hours. Leonas never told defendant she was under arrest and did not tell her she would be arrested if she refused to give a statement. Defendant was not handcuffed and was free to leave

the room. Defendant did leave to use the bathroom. No one followed defendant to the bathroom, and no female police officer accompanied her into the bathroom.

Leonas further testified that defendant was not patted down or searched. No personal property was taken from defendant. Defendant was not placed in a cell or required to walk past a cell. There were no guns in the interview room. Defendant was not photographed, fingerprinted, or "booked." Leonas described the conversation as "civil, calm, and polite." Leonas told defendant several times she was free to leave at any time, and he recalled telling her that specifically when she returned from the bathroom. Near the end of the interview, defendant asked what would happen to her if she did it. Leonas told her he could not make any promises, and defendant replied she had nothing further to say. At that point Leonas left the interview room. Leonas asked no further questions and did not attempt to interview her in any manner. Leonas met a man he believed was defendant's husband in the lobby. They spoke briefly, and he led the man to the interview room. Defendant and the man spoke privately and then left the police station.

Leonas further testified that defendant was not arrested until June 8, 1995, approximately 10 months after the interview. Leonas testified that an assistant State's Attorney, Daniel Gueran, was present at the police station on August 19, 1994, but was not in the room when Leonas interviewed defendant. Leonas also interviewed the victim's mother, father, and grandfather. The interviews were conducted in the same room and essentially followed the same format.

On cross-examination, Leonas admitted that there was no assistant State's Attorney present in the building when he interviewed the other individuals. Leonas testified that he notified Gueran of the other interviews, but that Gueran elected to observe only the interview with defendant. Leonas testified that when he interviewed defendant she was a suspect but denied that she was the "primary suspect." Leonas testified that he had heard from the mother, father, and grandfather, and wanted to hear defendant's side of the story. Leonas denied having a conversation with Gueran, but admitted speaking to him briefly about the progress of the interview. Leonas admitted that Gueran was present to approve an arrest if Leonas believed he had gathered enough evidence during the interview. Leonas testified that he discussed the case with Steven Kernan, a Department of Children and Family Services (DCFS) investigator. Leonas testified he could not recall whether he told Kernan on August 18 that the evidence pointed toward defendant.

On further cross-examination, Leonas admitted asking defendant for some DCFS documents and that it was possible she gave him the documents prior to August 19. Leonas testified that he did not interview defendant between August 12 and August 19. Leonas testified that he believed he asked defendant to bring the documents with her on August 19. Defendant arrived alone. Leonas testified that he could not recall if defendant asked whether she needed to bring an attorney with her when Leonas called to arrange the interview.

On further cross-examination, Leonas testified that neither he nor Williams was armed because a police department policy required them to store their weapons in a locker during interviews. Leonas testified that no other

police officers were present outside the interview room because the interview was conducted during the night shift and other officers would [have] been on patrol. Leonas denied seeing Williams take out his handcuffs during the interview. Leonas denied seeing Williams place handcuffs on defendant. Leonas admitted telling defendant during the interview that he believed she shook the victim. Leonas told defendant this after approximately one-half hour and continued the interview for the remainder of three hours. Leonas testified he did not advise defendant of the *Miranda* warnings because he did not believe she was in custody. Leonas admitted that during the interview he and Williams would leave defendant alone in the interview room. When they returned they would resume the interview.

The State rested following Leonas' testimony. Defense counsel called Theresa Jacobazzi, defendant's mother. Jacobazzi testified that sometime between August 12, and August 19, 1994, she accompanied defendant to the police station to drop off some documents. They originally arrived at approximately 6 p.m. but the officer they encountered would not accept the documents and told them to return at approximately 7:30 p.m. When they returned at 7:30, an officer took the documents from defendant, took defendant to another room, and told Jacobazzi to wait outside in the lobby. Jacobazzi waited approximately two hours until defendant returned. They then left.

Jacobazzi further testified that on August 19, 1994, she went to defendant's house. Jacobazzi arrived at approximately 10:30 p.m. and met defendant's husband. Defendant was not at home when Jacobazzi arrived, and defendant's husband left. At approximately 2 a.m. the next morning defendant arrived accompanied by her husband.

Defendant testified that she lived in Bartlett with her husband, Peter Janisko, and their son, Steven Janisko. On August 12, 1994, Leonas appeared at defendant's home with another officer. Defendant spoke to the officers for approximately 45 minutes. The officers did not advise defendant of the Miranda warnings, Defendant had never been confronted by a police officer in an official capacity before and "figured that [she] had to answer their questions."

Defendant further testified that sometime between August 12, and August 19, Leonas contacted her by telephone. Leonas asked defendant to bring him a DCFS document that was part of the application for childcare and contained the victim's medical history. Defendant asked if Leonas could pick up the document, and he replied that she needed to come to the police station. Defendant asked if she needed an attorney, and Leonas replied she did not at that time. Sometime before August 19, defendant went to the police station with her mother. They arrived at approximately 6 p.m. A police officer told defendant that Leonas was busy and asked her to return at 7:30. Defendant and her mother returned to the police station at 7:30. Leonas met defendant and led her to another room. Leonas told defendant's mother to wait in the lobby. Defendant was with Leonas for approximately two hours. Leonas did not advise defendant of her Miranda rights. Near the end of the conversation defendant said she had to leave. Leonas told her he didn't want her to leave, and asked her to stay for a few more questions. Defendant insisted on leaving, and she left.

Defendant further testified that Leonas telephoned her again and asked her to come to the police station on

August 19. Leonas asked her to drop off another document, a survey sheet related to the victim. Defendant asked if she needed an attorney, and Leonas replied that she did not. Defendant arrived at the police station at approximately 7:30 p.m. on August 19. Leonas asked defendant to answer more questions and led her through a "maze" of cubicles and offices to an interview room. Leonas and Williams interviewed defendant. They offered her a cup of coffee, and she accepted. Neither officer advised defendant of her *Miranda* rights. Defendant testified that she did not go to the interview room voluntarily.

Defendant testified that after approximately 40 minutes, Leonas told her that he did not believe her and that he knew she shook the victim. Leonas and Williams left defendant alone in the interview room at least five times. Each time they returned they began questioning her again. Defendant testified, "I asked to go to the bathroom. I asked to see a lawyer. I asked to leave. They kept telling me to sit down, it will only take five more minutes." Defendant testified that she asked to leave at least 12 times. She walked to the door several times, but a uniformed officer told her she couldn't leave and told her to return to her seat. Near the end of the interview, Williams displayed a pair of handcuffs. Defendant testified that Williams said he "had enough of this f ------- b --- s ---," grabbed her hands, pulled them behind her back, and placed handcuffs on her wrists. Defendant testified that Leonas said "not yet" and Williams did not lock the handcuffs.

Defendant further testified that an assistant State's Attorney entered the room shortly before Williams displayed the handcuffs. The assistant State's Attorney began asking questions but did not advise defendant of her

Miranda rights. The assistant State's Attorney told defendant that a three-year-old boy she watched would identify her as the person who shook the victim.

Defendant testified that before she went to the police station she was unaware of her Miranda rights. She believed that if a police officer asked a question, she was required to answer it. Defendant described Leonas' and Williams' demeanor as "good cop-bad cop."

On cross-examination, Defendant testified that she had lived with Janisko for 11 years and considered him her husband, but they did not have "papers as of yet." Defendant admitted that on August 12 the police officers did not arrest her or place her in a squad car. The conversation began and ended at defendant's home.

On further cross-examination, defendant testified that she thought she went to the station with her mother on a Monday but was unsure of the date. Defendant admitted that she made notes of her conversations with Leonas. Defendant testified that the notes would refresh her memory. Defendant identified a "log" that she created between August 18 and August 29, 1994, and testified that the notes were in her handwriting.

On further cross-examination, defendant admitted that the notes did not mention a meeting with Leonas before August 19. Defendant testified that her notes began on August 18. Defendant admitted that she spoke to an attorney before going to speak with Leonas. The lawyer told defendant she did not have to go to the police station – it was up to her to decide. Defendant admitted that she was not told she was under arrest, her picture was not taken, her fingerprints were not taken, and she was not

handcuffed at the start of the interview. Defendant testified that Williams had a gun, but did not remove it from its holster or threaten her with it. Defendant admitted that she never wrote in her notes that the police refused to let her leave. Defendant also admitted that her notes said Williams had the handcuffs, not that he placed the handcuffs on her wrists.

On redirect examination, defendant testified that the notes the State was using were not made contemporaneously with her interview with Leonas. The lawyer with whom defendant spoke prior to the interview was a friend who had prepared defendant's will. Defendant did not retain him to represent her in the criminal matter.

At the conclusion of the hearing, defense counsel asserted that he was surprised by Leonas' response to questions regarding his conversation with Kernan. Defense counsel requested a continuance so he could call Kernan to perfect the impeachment or alternatively requested the State to stipulate to the contents of a document prepared by Kernan that purported to memorialize an August 18, 1994, conversation with Leonas. The State refused to stipulate to the contents of the document. The trial court continued the matter stating:

> "THE COURT: The parties may continue to call witnesses as they wish. And I would strongly recommend that you do make a complete record, I heard the names of several witnesses, and either parties [*sic*] may want to call those witnesses.
>
> Otherwise the Court will draw its own conclusions accordingly."

The trial court commenced the continued hearing on January 27, 1998. Peter Janisko testified that he lived with defendant and they had a son together. On August 19, 1994, at about 7:30 p.m. defendant left to go to the police station to answer some questions. Janisko stayed home with their son. Janisko telephoned the police station at approximately 9 p.m. and asked to speak to defendant. He was told she was in an interview and was unavailable. After calling several more times, Janisko called defendant's mother to watch their son. At about 11 p.m. he went to the police station. Three police officers met Janisko at approximately 11:20 p.m. and told him that he could not see defendant. At approximately 12 a.m. the officers returned and told Janisko he could see defendant. The officers led Janisko to the interview room.

Janisko further testified that he saw defendant in the room with Leonas and another police officer. The second officer was holding handcuffs and was about to place them on defendant. Janisko testified that the officer said "he didn't want to put up with this c--- anymore, or something to that effect." Leonas told the other officer that will not be necessary, and he put the handcuffs away. The officer left the interview room and Janisko talked briefly with defendant. Leonas returned alone and told them they were done. Janisko returned home with defendant.

On cross-examination, Janisko testified that defendant knew she was going to be interviewed when she left for the police station; she was not simply dropping something off. Janisko testified that although a police officer held a pair of handcuffs, defendant was not handcuffed. After the handcuffing incident, the interview ended.

Kent Williams, a Bartlett police officer testified for the State in rebuttal. Williams testified that he and Leonas interviewed defendant on August 19, 1994. Defendant was told she was not under arrest and could leave at any time. On one occasion defendant left the interview room to use the bathroom. An officer showed defendant to the bathroom but was not assigned to follow her. Defendant returned from the bathroom on her own and met the officers outside the interview room. Neither officer wore a weapon because it would violate police department policy. Near the end of the interview, the officers advised defendant that the victim's injuries would have caused him to become immediately lethargic. When confronted with this assertion, defendant "hung her head and said what will they do to me if I told you that I did this." Leonas told her that he could not make any promises. Shortly after that, defendant indicated that she did not want to speak with the officers further and the conversation ended.

Williams further testified that after the interview ended, he spoke to Assistant State's Attorney Gueran. Gueran entered the interview room with defendant and spoke with her briefly. Williams walked back into the interview room, displayed his handcuffs, and told defendant to turn around. Gueran told Williams "don't do it" and Williams left without handcuffing defendant.

On cross-examination, Williams testified that he was assigned to the investigation for the first time on August 19, 1994. Williams denied that Leonas told him defendant was the only suspect. Leonas told Williams that defendant was coming in of her own free will and would not be arrested that evening unless she confessed to injuring the victim. Williams admitted that Janisko asked to see defendant and Williams refused to let him do so. Williams

testified that he spoke with Gueran near the end of the interview. Williams told Gueran that he believed that defendant made a tacit admission. Gueran suggested that Williams display his handcuffs to foster a relationship between defendant and himself.

Daniel Gueran, an assistant State's Attorney, testified that he was at the Bartlett police station on the evening of August 19, 1994. Gueran waited outside the interview room while Leonas and Williams interviewed defendant. Gueran saw defendant walk from the interview room to the bathroom unaccompanied. Eventually Leonas and Williams left the interview room. The officers recounted their conversation with defendant. Gueran asked if he could speak to defendant himself, and the police officers agreed. Gueran entered the room and introduced himself to defendant. He told her that she was not under arrest and was free to leave.

Gueran further testified that after he spoke with defendant, he left the room and spoke briefly with Williams. Gueran told Williams that he had not gained any additional information. Gueran further testified that,

> "It was decided that, perhaps, if we change the situation, which up to then had been a non-custodial, calm situation, if we had changed it and shown her the seriousness of what is going on by bringing in a custody type of situation into it, maybe that she would begin to give us a few more details."

They returned to the interview room and Williams displayed a pair of handcuffs and asked defendant to stand up and turn around. Gueran initially sat and watched defendant's reaction. After she stood, he told Williams that

there was no reason to go further, and left the room. Defendant made no further statements.

On February 5, 1998, the trial court heard closing arguments on defendant's motion to suppress. On March 4, 1998, the trial court stated that it had reviewed the case law presented by the parties and considered the factors identified including the length of the interrogation and the location. The trial court held that defendant was not in custody when she made the statements to the police and denied defendant's motion to suppress.

Mistrial

On June 9, 1998, the trial court commenced a jury trial and began jury selection. On June 10, 1998, defendant requested a mistrial because one of her attorneys was unavailable due to a serious illness in his family. The trial court granted defendant's request for a mistrial. The matter was continued several times for matters unrelated to this appeal.

Trial

Before the second trial, the State nol-prossed all charges except two counts of first degree murder – defendant shook the victim knowing that the act created a strong probability of great bodily harm and defendant shook the victim knowing that the act created a strong probability of death. On May 4, 1999, the trial court commenced the second jury trial. During jury selection, defense counsel exercised six peremptory challenges. Defense counsel subsequently attempted to peremptorily excuse two additional venire members. The State objected

asserting that defendant had only one peremptory challenge remaining. The trial court informed defense counsel that defendant was entitled to only seven challenges under Supreme Court Rule 434 (134 Ill. 2d R. 434(d)). Defense counsel asserted that he believed he was entitled to 10 peremptory challenges. The trial court disagreed, but indicated that it would consider any contrary authority. After a recess, defense counsel failed to provide authority for additional peremptory challenges and elected to strike only one of the two jurors he previously attempted to strike. The parties completed jury selection, and presented opening statements.

Dr. Chris Gruber, an emergency physician, testified that she was on duty at St. Joseph's Hospital in Elgin on August 11, 1994. The victim's mother brought him into the emergency room and appeared frantic. The victim was seizing and posturing. Gruber described posturing as a contraction of the extensor muscles, similar to stretching. Gruber determined that the victim did not have a fever and narrowed her diagnosis to a primary seizure disorder or seizure caused by brain injury. Gruber order a CT scan. While waiting for the results of the CT scan, Gruber contacted Lutheran General Hospital, and informed them that she intended to transfer the victim. Gruber testified that she planned to transfer the victim because St. Joseph's Hospital was not properly equipped to treat him. On cross-examination, Gruber testified that a radiologist, Dr. Ken Sullivan, read the CT scan and gave her a report.

The State and defense counsel then discussed the possible use of autopsy photographs during the medical examiner's testimony. Defense counsel argued that the photographs would be inflammatory and prejudicial. The State argued that the photos would be useful in aiding the

doctors description of the victim's injuries and agreed that they should not be published to the jury. The trial court ruled that the photos would be admitted into evidence, but would not be displayed to the jury or sent to the jury room during deliberation unless a dispute arose among the expert witnesses regarding interpretation of the photographs. The trial court indicated that it did not anticipate such a dispute but reserved its ruling on publishing the photos if a dispute did arise.

Cynthia C., the victim's mother, testified that she lived in Bartlett with her parents. The victim was born on October 3, 1993, and lived with Cynthia C. and her parents. The victim died on December 19, 1995. Cynthia C. admitted that after the victim died she was convicted of possession of a controlled substance. Cynthia C. had never married the victim's father, Matthew S., but they remained friends. The victim's pediatrician was Dr. Nadelman, and Cynthia C. took the victim to him when he was sick. The victim received well baby care at the Du page County Health Department (the Health Department). The victim was never treated for injuries by either Nadelman or the Health Department.

Cynthia C. testified that in July 1994 she sought out a new babysitter because she believed her current sitter allowed the victim to spend too much time alone in a playpen. Cynthia C. learned of defendant through an advertisement in the newspaper. Cynthia C. contacted defendant and they contracted for his care. In August 1994 the victim was 10 months old. Cynthia C. testified that prior to August 11, he was not developmentally delayed and could sit on his own, roll over, and crawl. The victim could walk with assistance.

Cynthia C. further testified that she typically left the victim at defendant's house at approximately 7:30 a.m., worked until 4:30 p.m., and picked up the victim immediately after work. When she picked the victim up, she would gather his belongings, bottles, and diaper bag. The victim was usually in the hallway, and the diaper bag was not usually packed. On August 8, 1994, Cynthia C. left the victim at defendant's house in the morning; the victim was uninjured. When she returned in the afternoon to pick up the victim, he had a bump on his forehead. The bump was red and about the size of a half dollar. Defendant told Cynthia C. the victim was standing against a chair and fell. The victim was "fine," smiling and happy. The victim did not appear ill during the evening, at dinner, did not vomit, and was not groggy. Cynthia C. decided not to take him to a doctor to examine the bump.

Cynthia C. testified that on August 9 she left the victim at defendant's house in the morning. She picked him up in the afternoon and he appeared well. Later that evening, he developed a fever. Cynthia C. gave the victim infant Tylenol and he fell asleep. On August 10 victim still had a fever. Cynthia C. called defendant and told her the victim would not be at her house that day. Cynthia C. stayed home with the victim. Later in the day the fever "broke," and Cynthia C. ran errands accompanied by the victim. The victim appeared happy, ate dinner, and went to bed at approximately 9 p.m.

Cynthia C. further testified that on August 11, 1994, the victim went through his normal morning routine. The victim was happy when they left Cynthia C.'s house, but began crying when Cynthia C. left him at defendant's house. Cynthia C. told defendant to call her at work if he kept crying. Defendant did not contact Cynthia C. at work.

Cynthia C. arrived at defendant's house at approximately 5 p.m. The victim was sleeping in a playpen. The victim's diaper bag was already packed. His diaper bag had never been packed before. The victim felt "heavy" when Cynthia C. picked him up. The victim had a scratch on his head. Defendant said that she scratched him with her fingernail while walking with him. Defendant said that she had been tumbling with the victim that day. Cynthia C. testified she thought the victim was in a deep sleep and felt it was unusual because he was usually awake when she picked him up and fell asleep in the car.

Cynthia C. testified that after she left defendant's house she drove to Matthew S.'s house. As she drove, Cynthia C. tried to wake the victim. She pulled on his legs, tickled him, and called his name. The victim was stretching, and Cynthia C. thought he was trying to wake up. The victim was not normally difficult to wake. When Cynthia C. arrived at Matthew S.'s house, she walked around the car to remove him from his car seat. She noticed that the victim's eyes did not appear normal, and he was staring out the window. Cynthia C. held the victim while she and Matthew S. tried to wake him by calling his name. She did not shake the victim. Matthew S. did not shake the victim. When she was unable to wake the victim she got back into the car and drove [to] the St. Joseph's emergency room.

Cynthia C. described her actions at the hospital as follows:

> "Q. After learning what [the victim's] prognosis was, what did you decide to have done?
>
> A. They were flying him to Lutheran General.

Q. What did you do after you learned that [the victim] was going to be going to Lutheran General?

A. We had him baptized."

Cynthia C. testified that she next saw the victim at Lutheran General. He was on a respirator and his head was wrapped in a bandage. The victim stayed at Lutheran General for one month and never regained consciousness. The physicians at Lutheran General referred the victim to Marionjoy in Wheaton for rehabilitation. The victim went to Marionjoy on September 12, 1994. While at Marionjoy, the victim made limited progress. Eventually, the physicians at Marionjoy indicated that he was unlikely to make further progress and suggested an institutional setting. Cynthia C. visited Little Angels in Elgin, but decided to care for the victim at home. Cynthia C. brought the victim home on October 29, 1994. The victim never fully regained consciousness. On December 7, 1995, the victim was readmitted to Lutheran General with pneumonia. The victim died on December 19, 1995. Cynthia C. testified that she never spoke with defendant after August 11, 1994. Defendant never telephoned to inquire regarding the victim's condition.

On cross-examination, Cynthia C. testified that she met Matthew S., the victim's father, in high school. They were never married. She was 19 years old when the victim was born. Cynthia C. testified that Matthew S. supported the victim by giving her money to pay for food or diapers and by watching the victim while Cynthia C. worked. Cynthia C. admitted that Matthew S. had fathered two other children and that those children do not reside with him. Cynthia C. testified that when she first met with defendant regarding childcare, defendant picked up the

victim. Cynthia C. believed defendant interacted properly with the victim. Cynthia C. admitted she did not attend parenting classes before or after the victim was born.

On further cross-examination, Cynthia C. testified that the victim was teething and four teeth came in during the first week he was with defendant. He was drooling and had a runny nose because he was teething. Cynthia C. did not recall having a conversation with defendant regarding the drooling or runny nose. Matthew S. spent time with the victim on August 7, 1994. The victim stayed at Matthew S.'s house during the afternoon. Matthew S.'s father and two brothers shared the house. Matthew S. was 17 years old at the time. Matthew S. had not taken any parenting classes that Cynthia C. was aware of.

On further cross-examination, Cynthia C. testified that when she noticed the victim's fever on August 9, she did not think medical attention was necessary. The last time the victim saw a doctor before then was in the latter part of July 1994. Cynthia C. took the victim to Dr. Nadelman because he had sores in his mouth from teething. Cynthia C. testified that on the morning of August 11 when she dropped off the victim, she did not notice anything unusual about defendant's demeanor. Cynthia C. was not concerned at that time that defendant had injured the victim. When Cynthia C. picked the victim up in the afternoon she commented to defendant that he seemed sleepy. Defendant said that he was just really tired.

On further cross-examination, Cynthia C. testified that within 30 days of the victim's admission to the hospital, she filed a civil law suit against defendant in Cook County. Cynthia C. admitted that the complaint alleged that defendant had been negligent in her care of the

victim. Cynthia C. admitted filing an amended complaint in December 1997. Cynthia C. admitted that she was convicted of delivery of a controlled substance in April 1997. Defense counsel inquired whether Matthew S. had also been convicted, and the trial court sustained the State's objection. Cynthia C. denied using controlled substances. Cynthia C. testified that she told a DCFS investigator that the victim sustained a shaking injury. Cynthia C. admitted she may have told the investigator that the victim could have been injured in a fall and that the injury could have begun as slow brain leak that solidified.

Joseph Leonas, a Bartlett police officer testified that on August 12, 1994, he investigated the victim's injury. Leonas spoke to defendant at her home and asked about an injury that occurred on August 8. Defendant said that she was holding the victim's hands as he walked, placed him on the kitchen floor, and he fell forward hitting his head. She also said that she believed the victim was underdeveloped for his age and malnourished. Defendant also said that on August 11 the victim was well except for flu-like symptoms and a mild fever. Leonas testified that he was later informed that the victim had suffered injuries consistent with shaking and that the injuries could not have occurred on August 8. Leonas decided to reinterview defendant.

Leonas further testified that on August 19, 1994, defendant drove herself to the police station. Defendant said that the victim bumped his head after walking in the kitchen while she was teaching him to sit up. Defendant said the victim could not crawl and was underdeveloped and complained that Cynthia C. did not bring enough

bottles to feed him. When asked about August 11, defendant said she was "foggy on that day." Defendant said that when Cynthia C. picked up the victim, he was groggy and wiped out. Leonas confronted defendant and told her that the medical evidence indicated that the victim was injured on August 11 not August 8 and the injury was the result of shaking not a fall. Defendant denied shaking the victim. Defendant said that the victim may have been injured dancing with her or tumbling, but that she did not shake him. Defendant also said that a one-year-old may have tripped on the victim. Defendant told Leonas that no other adults were in the house on August 11. Leonas confronted her with the medical evidence again. Defendant grew quiet, looked at the ground, and said "What would happen to me if I told you I did this?" Leonas did not arrest defendant and she left the police station.

On cross-examination, Leonas testified that defendant was cooperative when he spoke with her on August 12. Leonas admitted that he did not go to any of the neighboring houses, did not call for an evidence technician, did not take photographs, and did not collect carpet or other samples. Leonas testified that he took no further action on the case until Monday, August 15. Leonas learned new information that led him [to] conduct further inquiries. Leonas interviewed Matthew S., Cynthia C., and Cynthia C.'s father that evening. Leonas admitted he did not canvas defendant's neighborhood or speak to her neighbors.

On further cross-examination, Leonas testified that he interviewed defendant on August 19, 1994. Leonas' testimony regarding the circumstances of this interview was substantially similar to his testimony during the suppression hearing. Defense counsel questioned Leonas

regarding the Miranda warnings. The questioning prompted the following discussion:

> "Q. Okay. I just wanted to know because I didn't know if we're talking about the same four warnings.
>
> And then before – after you give these warnings, normally, you said –
>
> MS. RADOSTITS [Assistant State's Attorney]: Objection.
>
> MR. MONTEMURRO [Defense attorney]: You say, do you understand this? And do you want to waive them and talk to me? Isn't that like a fifth warning? Isn't that the normal course?
>
> MS. RADOSTITS: I'll withdraw the objection.
>
> THE COURT: Okay. Well, she's not in custody, Mr. Montemurro, I take it. So, he doesn't have to give her the warnings.
>
> MR. MONTEMURRO: I think – I think the ladies and gentlemen of the jury should know the circumstances around the conversation.
>
> THE COURT: That's fine.
>
> MR. MONTEMURRO: Or interrogation or whatever you want to describe it as.
>
> THE COURT: Under the law, ladies and gentlemen, there are certain circumstances in which an individual that's in police custody has to be given their, quote, *Miranda* Warnings, which have been stated by Mr. Montemurro.

> We've had pretrial hearings on this matter, and she was not – it was the court's determination she was there at the station voluntarily.
>
> You may proceed."

On continued cross-examination, Leonas testified that he did not interview any additional witness or perform background checks on anyone after August 19, 1994. Leonas kept the case open and waited for doctors to provide additional medical evidence. On redirect examination, Leonas testified that he was not required to give defendant the *Miranda* warning because she was not under arrest.

Lynn C., the victim's grandmother, testified that she knew of nothing medically wrong with the victim when he lived in her home with Cynthia C. In August 1994 Lynn C. and Cynthia C. decided to find a new childcare provider for the victim because they believed the current provider left him crying in his crib too often. Lynn C. worked at the same company as Cynthia C. and they drove together. Cynthia C. left the victim at defendant's on her way to work and Lynn C. would help her carry his things into the house. Defendant began watching [the victim] the first week of August 1994. Lynn C. did not notice anything unusual about the victim that week.

Lynn C. further testified that on Monday August 8, 1994, the victim began a second week with defendant. That afternoon, Lynn C. observed a bruise on the victim's head. The victim was acting normally and appeared fine. Defendant told Lynn C. that the victim had been standing by a chair in the kitchen and fell. On August 10, 1994, the victim was running a fever and had a runny nose. Cynthia

C. decided not to send the victim to defendant's house and stayed home with him.

Lynn C. testified that on August 11, 1994, the victim ate a breakfast of cereal and drank a bottle. The victim appeared well; Lynn C. believed he might have had a slight fever but was not worried. Lynn C. did not notice anything unusual about the victim's face or eyes that morning. In the evening, Lynn C. was called to St, Joseph's Hospital and learned that the victim was "brain dead."

Lynn C. further testified that on August 11, the victim weighed 22 pounds. Prior to August 11, 1994, Lynn C. had never observed anyone physically abuse the victim and had never seen anyone shake him. After August 11, the victim was in a vegetative state. He remained in that state for 16 months until he died in December 1995. Lynn C. testified that on August 12, 1994, she spoke to defendant. Lynn C. told defendant that the victim was in very serious condition and that she believed his condition was caused by the accident on Monday, August 8. Cynthia C. did not have medical insurance for the victim. Lynn C. asked if defendant had medical insurance. She never received a response from defendant.

On cross-examination, Lynn C. testified that when she called defendant she said "Do you have an insurance company?" and "You'd better notify them." Defendant told Lynn C. she was insured and would notify her insurance company. Lynn C. testified defendant did not express sadness regarding the victim's injury. Lynn C. admitted that Cynthia C. filed a civil suit against defendant and that both parties were represented by attorneys. Lynn C. admitted that Matthew S.'s brother would sometimes watch the victim.

Jerry Bauer, a neurosurgeon at Lutheran General, testified that he treated the victim on August 11, 1994. Bauer examined a CT scan taken at St. Joseph's and determined that the victim had a subdural hematoma, a blood clot on the surface of the brain, and a midline shift, evidence of swelling on the left side of the brain. Bauer conducted a physical examination and determined that the victim was comatose, he did not respond to pain, and his pupils were fixed and dilated. Bauer performed a craniotomy and discovered freshly clotted blood. Bauer opined that the injury which caused the bleeding occurred within several hours. Bauer opined that the cause of the injury was shaken baby syndrome. Bauer based his opinion on the presence of a subdural hematoma, swelling, retinal hemorrhages, and the absence of external bruising or injury.

Bauer further testified that the CT scan was taken at 6:45 p.m. on August 11, 1994. Bauer opined that the injury occurred no less than two hours and no more than eight hours before the CT scan was taken. Bauer opined that a child who suffered such an injury would rapidly lose consciousness. The loss of consciousness might be delayed 10 or 15 minutes but would certainly occur within one hour. Before losing consciousness the child would be irritable, might have seizures, and would progressively fall into a coma. Bauer opined that based on his examination during surgery and the CT scan, the victim did not suffer from a slow bleed type of injury. On cross-examination, Bauer testified that this type of injury could only be caused by shaking or other severe trauma such as falling out of a second-story window.

Dr. Maureen Quaid, a pediatric critical care physician, testified that in August 1994 she treated the victim at

Lutheran General. Quaid testified that shaken baby syndrome is a form of child abuse that results from the vigorous force applied to a baby's brain by shaking. Quaid testified that the bleeding, brain swelling, and retinal hemorrhages the victim suffered were pathognomonic, typical and indicative of, shaken baby syndrome. Quaid testified that absent overwhelming evidence of some other cause, a physician will diagnose the cause of such injuries as shaken baby syndrome.

Quaid further testified that a skeletal survey did not reveal any evidence of prior injury to the victim. The victim showed evidence of brain stem injury. He was in vegetative state and remained in that state until he was released from the hospital. Quaid opined that the victim's injuries resulted from shaken baby syndrome. Quaid further opined that the injury most likely took place between 2 and 12 hours before he was initially seen at the hospital.

Quaid testified that she spoke with Cynthia C. and determined that Cynthia C.'s description of the victim's condition was consistent with a shaken baby injury that occurred while in defendant's care. Quaid opined that the injury could not have occurred as the result of the victim falling forward and bumping his head from a sitting position, falling from a standing position, dancing, or somersaulting. Quaid also opined that the injuries could not have been caused by another child. Quaid did not believe that the injuries could have resulted from an old injury that rebled because the initial injury would have had to be severe enough to cause major symptoms.

Quaid further testified that the victim was readmitted to Lutheran General on December 7, 1995. He was suffering from pneumonia and a high fever. Quaid testified that the victims of head injuries who survive in a persistent vegetative state are susceptible to pneumonia. Quaid opined that the victim's condition on December 7, 1995, was directly related to his injuries on August 11, 1994. The victim died on December 19, 1995, as a result of his injuries on August 11, 1994.

Dr. Wilbur Smith, a diagnostic radiologist, testified that he is chairman of the diagnostic radiology department at Henry Ford Health System in Detroit. Smith testified that he is board certified in the subspecialty of pediatric radiology. Smith examined the victim's CT scan and skeletal survey. Smith testified that the victim suffered from both subdural and subarachnoid bleeding. Smith testified that that combination of injuries is almost always the result of shaking. Smith opined that after learning that the victim also had retinal hemorrhages, there was no doubt in his mind that the victim's injuries were the result of shaking. Smith testified that similar injuries would require a fall from a three or four story height or an unrestrained car accident where the head hit the dashboard.

Smith further testified that the victim's injury would have been immediately symptomatic. After the injury the victim would have been incapable of eating; he might suck once or twice but would not drink a whole bottle. Smith opined that the victim would not look normal to any caregiver. Smith testified that the St. Joseph CT scan revealed an area of less dense blood. Smith testified that this was consistent with an older injury, but was also

consistent with the victim lying on his side following the injury. Smith testified that his diagnosis was not difficult because the victim displayed all of the classic signs and symptoms of abusive head trauma.

Dr. Mary Elizabeth Keen, a specialist in physical medicine and rehabilitation, testified that she treated the victim at Marionjoy. When she first examined the victim he displayed the signs of a very severe brain injury. The victim did not respond to sound, light, or touch. Keen diagnosed the victim with a shaken impact type of traumatic brain injury. Keen prescribed various forms of therapy for the victim, but he made very little progress. He was discharged on October 29, 1994, because he had plateaued and remained in a vegetative state. Keen opined that based on his medical history, the victim was injured as the result of child abuse. Keen described his injury as being as severe as it could be and the victim still survive.

Dr. Demetra Soter, a pediatrician specializing in trauma and burns, testified that she reviewed the victim's medical records. Soter described her involvement in the case as follows:

> "Q. Doctor, did you have an opportunity to review the medical records and documentation for [the victim.]
>
> A. Yes.
>
> Q. And how is it that you obtained this information?
>
> A. In 1985 [*sic*] a defense lawyer contacted me and asked me to review the medical records and the CT scans and X rays."

Soter opined that the victim had the "classic symptoms" of shaken baby syndrome. Soter testified that it takes a tremendous amount of force to cause these injuries. Soter opined that a fall from a seated position could not cause this type of injury, Soter testified that the victim did not suffer a bleed/rebleed type injury. Soter opined that based on her examination of the medical evidence that the victim was injured sometime after he was left at defendant's house in the morning and before Cynthia C. picked him up in the evening.

Dr. David Nadelman, a pediatrician, testified that he provided well child care to the victim. Nadelman never observed any signs off child abuse and believed that the victim was meeting the appropriate developmental milestones when he examined him. On cross-examination, Nadelman testified that he did not provide well baby care after the victim was two months old, because he was a public aid patient. Nadelman referred Cynthia C. to the Health Department for well baby care, but told her he would treat the victim without charge for illnesses. On redirect examination, Nadelman testified that he treated the victim for an illness on July 18, 1994, and did not note that he was developmentally delayed.

Dr. Eupil Choi, a pathologist, testified that he performed an autopsy on the victim on December 20, 1995. Choi observed that the body had been embalmed prior to the autopsy. When asked if the embalming process was disruptive to the autopsy process he replied, "internally and externally I recognized [sic] embalming changes so that I can differentiate any abnormalities * * * ." Choi described evidence of brain injury and retinal hemorrhages, Choi opined that the injuries he observed were consistent with shaken baby syndrome. Choi determined

that the cause of death was subdural hematoma, due to blunt trauma, either shaking or striking the head. Choi then identified and described a series of photographs without displaying them to the jury. Choi described people's exhibit number 23 as follows:

> "This photograph shows the left side of the head after open [sic] the skull and is showing very small sized left side of the brain and, again, showing the other side which is the right side of the brain."

Choi's descriptions of the other photographs were similar.

Dr. Deena Fintel Leonard, a pediatric ophthalmologist, testified that on August 12, 1994, she examined the victim. The victim had scattered retinal hemorrhages in both eyes. Leonard observed concentric folds and fresh blood in the victim's left eye. Leonard described the changes as "absolutely consistent" with shaken baby syndrome. Leonard opined that the changes in the victim's left eye were pathognomonic for shaken injury and testified that she had never seen similar conditions outside a diagnosis of shaken injury. Leonard testified that there was no differential diagnosis for the changes she observed; there was no other explanation for the changes. Leonard opined that the changes she observed were not the result of resuscitation efforts or increased intercranial pressure. Leonard testified it was an easy case to diagnose.

On cross-examination, Leonard admitted that retinal hemorrhages can be caused by increased intercranial pressure or resuscitation. Leonard testified that the hemorrhages she observed in the victim's right eye were consistent with many causes but the hemorrhages she

observed in his left eye were of a type and location consistent only with a shaken injury.

Dr. Randell Alexander, a pediatrician, testified that he reviewed all of the victim's medical records and prepared a report. Alexander testified that the preparation of a report is important because it allows other colleagues to determine whether they agree or disagree with your findings. Alexander testified that the victim's combination of injuries indicated shaken baby syndrome. Alexander described the injury process and played a CD-ROM that demonstrated the mechanism of shaken baby syndrome. Alexander testified that the injury the victim suffered when he struck his head did not contribute to the shaken baby syndrome or his death.

Alexander testified that a child with injuries like the victim's would display symptoms immediately. The child would be "knocked out," would be unable to eat, would develop some breathing difficulties and might display seizures or posturing. Alexander described posturing as the process of the brain shutting down. Posturing is more severe than a seizure and can be seen as stiffening. Alexander found evidence of posturing in the victim's medical records. Alexander testified that a child with such a serious brain injury would only survive one or two hours without medical attention. Alexander opined that based on his review of the medical evidence the victim suffered his injury sometime in the mid to late afternoon on August 11, 1994. Alexander testified that if one did not carefully examine a child with injuries like the victim's, the symptoms could look like sleeping.

Alexander further testified that the victim's injuries were not inflicted by dancing, tumbling, or somersaults.

Alexander testified that the victim did not suffer a bleed/rebleed type of injury. Alexander opined that the victim died as the result of shaken baby syndrome and that it was not a difficult case to diagnose. On cross-examination, Alexander testified that seizures and posturing were consistent with each other.

The State rested and moved for admission of its exhibits. The autopsy photos described by Choi were admitted into evidence, but the trial court ruled that they would not be given to the jury during deliberation. Defendant moved for a directed verdict, and the trial court denied defendant's motion. Defendant also moved for a mistrial based on the trial court's instructions to the jury during Leonas' testimony. The trial court denied defendant's motion reasoning that it had a duty to clarify legal issues for the jury without commenting on the credibility of the witnesses. The trial court also observed that it would likely be asked to give an instruction to the jury regarding defendant's statements and their duty to determine whether or not a statement was made.

Dr. Kenneth Sullivan, a neuroradiologist, testified for the defense. On August 11, 1994, Sullivan reviewed a CT scan of the victim. Sullivan prepared a report in which he found that the CT scan revealed a subdural hematoma with both acute and chronic bleeding. Sullivan testified that he used the phrase "acute" to describe injuries occurring within a few hours and the phrase "chronic" to describe injuries 10 to 14 days old or older. Sullivan testified that the subdural hematoma he observed in the victim contained a mixture of old and new blood.

On cross-examination, Sullivan testified that he was not certified as a neuroradiologist when he first reviewed

the CT scan, but was certified as a radiologist. Sullivan testified that on August 11, 1994, the victim had suffered a severe head injury. Sullivan testified that it was possible the CT scan reflected a layering of blood or a mixture of blood and spinal fluid, but he did not believe it did so. Sullivan testified that he did not know whether a neurosurgeon who performed a craniotomy would be in a better position to determine whether blood was old or new.

Peter Janisko testified that he had lived with defendant for 12 years and they had a child together. On August 19, 1994, Janisko went to the Bartlett police station. His testimony describing his trip to the police station was substantially the same as his testimony at the suppression hearing. On cross-examination, Janisko testified that he was present when Leonas interviewed defendant on August 12, 1994. When asked whether defendant told Leonas that the victim was underdeveloped, he replied that the victim was underdeveloped. Janisko testified that he based his opinion regarding the victim's development on his physical features and that he had a funny looking head. Janisko admitted that he never cared for the victim while he was in defendant's care.

Karen Stewart, a religious education director, testified that she was familiar with defendant and her reputation in the community. Stewart testified that defendant had a reputation as truthful, peaceful, and law abiding citizen.

Teresa Jacobazzi, defendant's mother testified that she lived about one block from defendant. In August 1994 defendant was watching three children. Jacobazzi testified that she had seen defendant feed the victim, give him bottles, and change his diapers. Jacobazzi testified she never saw defendant hit or shake the victim. On August

11, 1994, Jacobazzi was gardening in her front lawn. At 3:15 p.m. defendant passed the house with the children. The victim appeared well, he opened his eyes and responded to Jacobazzi's voice. Defendant took the children to a park across the street from Jacobazzi's home. Jacobazzi observed the children playing normally in the park. At approximately 4 p.m. she saw defendant return to her home, but did not interact with the children as they passed. On cross-examination, Jacobazzi testified that the longest period of time she spent at defendant's house while she was watching the victim was 10 minutes.

The defendant's next witness was Dr. Jan Edward Leestma. The State argued that because Leestma had not prepared a written report that its rebuttal witness, Dr. Kirschner, should be allowed to remain in the courtroom despite a prior motion to exclude witnesses; defendant objected. The trial court granted the State's request over defendant's objection. Defense counsel argued that Leestma should be allowed to remain in the courtroom during Kirschner's testimony to prepare possible surrebutal testimony. The State did not object to Leestma's presence during Kirschner's testimony.

Leestma testified that he is a pathologist and neuropathologist. Leestma testified that he reviewed the victim's medical records. Leestma reviewed the CT scan and Sullivan's report. Leestma also examined a slide prepared from a specimen taken of the subdural hematoma during surgery. Leestma determined that the slide revealed both fresh blood and blood that had been present for up to ten days. Leestma testified that a subdural hematoma could bleed over minutes, days, hours, weeks, or even longer. Leestma testified that, as part of the body's natural healing process, new blood vessels grow into a hematoma.

If those blood vessels leak, a self-perpetuating bleed/rebleed process can result in a chronic hematoma. Leestma opined that the oldest components of the hemtoma were 10 or 11 days old.

Leestma further testified that a subdural hematoma may develop without symptoms or with only vague symptoms, such as a minor headache, and might not be recognized. Leestma testified that if a hematoma developed slowly the brain could compensate by moving within the spinal fluid. When all of the spinal fluid had been pushed away, symptoms would begin to develop quickly. Leestma testified that "a whole lot of symptoms kind of blow up out of nowhere" once a critical phase is reached. Leestma opined that a child who was otherwise developing normally, able to hold up her or his head, crawling, and learning to walk, could loose those abilities if she or he was suffering from such a slowly developing hematoma.

Leestma testified that retinal hemorrhages can be caused by a variety of mechanisms including inherited conditions, diabetes, and hypertension. Leestma described the mechanism behind the association between shaking and retinal hemorrhages as highly controversial. Other causes of retinal hemorrhages in infants are elevated intercranial pressure and cardiopulmonary resuscitation. Leestma found evidence of increased intercranial pressure in the victim's medical records. Leestma opined that retinal folds have many causes and although they are often described as a litmus test for shaken baby syndrome, the mechanism is not completely understood. Leestma further opined that retinal hemorrhages and retinal folds were not an indication of shaken baby syndrome to the exclusion of other causes.

Leestma further testified that a diagnosis of shaken baby syndrome requires a good autopsy, if the child has died, an examination of the neck, eyes, and X rays of the body to determine if there is a pattern of prior abuse, and an examination for grip marks. Leestma explained that shaking a baby requires grabbing the child by the head, chest, arms, or other part, and that the greater the physical force used the more likely some indication of that force will be visible on the child's body. Leestma found no indication of grip marks in the victim's medical records.

Leestma described his conclusions as follows:

> "Q. Based on a reasonable degree of medical certainty, do you have an opinion as to whether or not [the victim] could have received these injuries only by the means of being shaken?
>
> A. I have an opinion.
>
> Q. And what is that opinion?
>
> A. My opinion is that that is not a realistic conclusion and that I don't know how he came to have any injuries that he had, how the subdural hematoma formed, what, if anything, caused him to reactivate or continue to bleed.
>
> Q. And what do you base the fact that this is not – that is not a reasonable conclusion that this only occurred by shaking?
>
> A. I think the evidence that causes one to draw a shaking conclusion, which has all been discussed, has not that firm a scientific basis to it. I think it's not good enough at this point to make a pronouncement about any of the findings

to imply a mechanism of how it might have occurred, and there you have it."

On cross-examination, Leestma testified that he did not prepare a written report of his findings because he was not asked to prepare a written report. Leestma admitted that he wrote a treatise titled "Forensic Neuropathology" and that in the treatise he wrote that expert witnesses should bear in mind that reports are often available through discovery and can be used at trial if later opinions vary from the report. Leestma admitted that he was being paid for his time and charges $350 per hour for case work and $450 per hour for all other work. Leestma testified that he had received a $1,500 retainer.

On further cross-examination, Leestma testified that he had treated live patients only occasionally. Leestma had never examined a living child to determine whether she or he was the victim of child abuse. Leestma had never performed a forensic autopsy on a suspected child abuse victim.

On continued cross-examination, Leestma admitted that in his treatise he included a chapter entitled "Neuropathology of Child Abuse." Leestma admitted writing that one of the most common forms of head injury observed in the victims of fatal child abuse is a subdural hematoma. Leestma denied that the victim's subdural hematoma indicated that this was a case of child abuse, but testified that child abuse would head the "list of immediate suspicion." Leestma also admitted writing that "it is an inescapable fact that the vast majority of seriously head-injured infants and children in [which] automobile and other major accidental trauma can be ruled out acquired their injuries as a result of child abuse." Leestma

also admitted writing that "shaken baby syndrome consists of fatal or non-fatal subdural hematoma, retinal hemorrhages, and brain swelling with or without apparent external injury and skull fracture."

On further cross-examination, Leestma admitted that the victim's injuries were consistent with shaken baby syndrome. Leestma also admitted that based on the victim's condition when he arrived at the hospital, his working assumption would have been child abuse. Leestma admitted writing that:

> "Functionally the shaken child will either be rendered stuporous or unconscious during the shaking. Such children may be put to bed and to an observer may appear to be sleeping peacefully when in reality they are in a coma."

Leestma also admitted writing that an eye examination is crucial to interpretation of a shaking death because retinal hemorrhages are frequently observed. Leestma admitted writing:

> "It is sometimes an issue at trial often exploited by defense attorneys that the apparent lack of external evidence of injury in connection with massive intracranial [sic] trauma somehow correlates better with accidental injury rather than a willful one. This interpretation is fallacious and should not be conceded."

During Leestma's cross-examination, defense counsel objected that Kirschner was passing notes to the assistant State's Attorneys. Defense counsel argued that it was inappropriate for Kirschner, a witness, to take an active role in the prosecution. The State replied that it had an absolute right to consult with its witnesses. The trial court

indicated that it would take the matter under advisement. At the conclusion of Leestma's testimony defense counsel requested copies of the notes passed by Kirschner. The State objected that the notes were work product. Defense counsel suggested that the trial court hold the notes and make an *in camera* examination. The following colloquy then occurred:

> THE COURT: Well, I think that's probably a good suggestion. Why don't we tender it to the clerk for in camera inspection, if need be * * *.
>
> MS. MASTERS (Assistant State's Attorney): Judge, can I just say one thing?
>
> THE COURT: Sure.
>
> MS. MASTERS: There was one thing handed to me.
>
> THE COURT: Well, that's all I want then.
>
> MS. MASTERS: I don't know what else – Judge, there was one thing handed to me.
>
> THE COURT: Okay. Well, that's all I want. Tender it to the clerk for an *in camera* inspection."

Defendant testified that in 1994 she had been in the business of daycare for six years and held a license issued by DCFS. On August 1, 1994, she noticed that the victim was drooling and had a runny nose. On August 2, 1994, defendant told Cynthia C. that she did not think she brought enough for the victim to eat during the day, and she suggested feeding him cereal or jarred baby food, Cynthia C. told defendant that she put cereal in the

bottles, and defendant thought that was unusual. On August 3 defendant noticed that although Cynthia C. said the victim had the capabilities of a one-year-old, he could not stand without assistance. On August 4 defendant noticed that the victim still had a runny nose and felt warm. Defendant suggested that Cynthia C. take him to a doctor. Defendant also suggested feeding the victim jarred baby food.

Defendant further testified that on August 8, 1994, she took the victim with her to the kitchen to get his bottle. Defendant sat the victim on the floor. The victim fell from a sitting position and struck his head. Defendant applied ice to the victim's head. Defendant told Cynthia C, that she did not think it was serious but suggested seeing a doctor to have it checked. Defendant further testified that the victim did not swallow properly and tended to spit out food when she fed him. Defendant testified that nothing unusual happened on August 9. Defendant suggested again that Cynthia C. take the victim to a doctor but Cynthia C. refused, On August 10, defendant did not see the victim; Cynthia C. telephoned to say that he had a fever.

Defendant testified that on August 11 Cynthia C. left the victim at her house at 7:30 a.m. Cynthia C. said that the victim's fever was down but that one of the bottles contained Tylenol and instructed defendant to use that bottle if his fever returned. Defendant testified that Cynthia C. seemed to be in a hurry and handed her the victim quickly. At 3 p.m., defendant took the victim with her to a park. Defendant stopped and spoke to her mother on her way to the park. At approximately 4:30 p.m. they returned to defendant's house. Defendant gave the victim a bottle in his playpen. Defendant did not notice anything

unusual about the victim. Cynthia C. picked up the victim shortly before 5 p.m. Cynthia C. packed up the victim's diaper bag and took it to her car. Cynthia C. returned to pick up the victim. Defendant did not notice anything unusual about the victim as Cynthia C. was leaving.

Defendant further testified that on August 12, 1994, she received a telephone call from the victim's grandmother, Lynn C. Lynn C. told defendant that the victim would not be at her home that day. Lynn C. also advised defendant to contact her insurance company. In response, defendant contacted her insurance agent. Defendant testified that she spoke to the police at her home at about 5:30 p.m. Defendant also testified regarding her subsequent conversations with the police. Her testimony regarding the circumstances surrounding these conversations was substantially similar to her testimony at the suppression hearing. Defendant testified that she contacted an attorney before speaking to the police. Defendant testified that she did not tell the police that another child might have stepped on the victim. Defendant did not tell the police he might have been injured tumbling or dancing. Defendant denied asking the officers, "What would happen to me if I told you I shook this baby?"

On cross-examination, defendant testified that she received pamphlets and books from DCFS as part of the licensing process. Defendant testified that she should have received a pamphlet that said never shake a baby and that shaking a baby could inflict bodily harm or death. Defendant also testified that DCFS could revoke her license. Defendant testified that she did not know whether DCFS began an investigation of the victim's injury. Defendant testified that she did not recall whether she had a telephone conversation with a DCFS investigator. The State

inquired whether defendant's license had been revoked, defense counsel objected, and the trial court sustained the objection.

On further cross-examination, defendant testified that she had a rule against caring for sick children. Defendant admitted that she never believed the victim was too sick to be cared for in her home. Defendant admitted that after the victim fell on August 8, she did not call his pediatrician and he appeared fine the next day. The State introduced defendant's notes, and she admitted that she wrote them. Defendant admitted that the notes indicated that she had spoken to an attorney. Defendant admitted that her notes said keep your statement simple, and do not sign anything. Defendant admitted that Lynn C. telephoned her on August 12. Defendant testified that she did not call the victim's family regarding his condition after August 12 because her insurance agent instructed her not to.

At the conclusion of defendant's testimony, defense counsel moved for a directed verdict, moved to bar Kirschner's rebuttal testimony, and moved for a mistrial based on Kirschner's conduct and the conduct of the prosecutors with regard to the note-passing incident. During argument on defendant's motions, defense counsel asserted that the State had not tendered all of Kirschner's notes. The trial court addressed the issue as follows:

> "THE COURT: But wait a minute. If there are other notes that were tendered to co-counsel, you should tender those.
>
> MS. MASTERS: But, Judge, yesterday you said – when I said I was handed one note, you said give me one note.

THE COURT: Okay. That's fine. Proceed."

Following additional argument, the trial court denied defendant's motions.

Dr. Edmund Pellettiere, a pathologist, testified for the State in rebuttal. Pellettiere testified that he is a surgical pathologist at Lutheran General and examined the slide prepared from the specimen of subdural hematoma taken from the victim during surgery. Pellettiere testified that he saw no evidence of repair in the slide and opined that the hematoma was recent.

Dr. Robert Kirschner, a forensic pathologist, testified that he was contacted by the State to comment to Leestma's testimony. Kirschner also reviewed the victim's medical records. Kirschner opined that Leestma's opinion regarding the cause of the victim's injuries was inconsistent with the medical records. Kirschner opined that the injuries were consistent with shaken baby syndrome and that in the absence of a motor vehicle accident or a fall from a height, there was no natural disease process that could explain the injuries. Kirschner opined that old blood in the subdural hematoma did not contribute to the victim's death. Kirschner testified that he examined the microscope slide and saw no evidence of old blood. Kirschner further testified that the neurosurgeon would have seen evidence of old blood if it was present in the hematoma.

The parties presented closing arguments. Defendant raises numerous issues on appeal related to the State's closing arguments. Relevant portions of the State's argument are set forth in our analysis of those arguments. Following deliberation, the jury found defendant guilty of

first degree murder. The trial court continued the matter for sentencing.

Post trial Motions

On June 16, 1999, defense counsel filed a motion in arrest of judgment, motion for new trial, and motion for extension of time to file posttrial motions. On June 29, 1999, attorney Montemurro withdrew his appearance, and attorney Aldo Botti filed an appearance as substitute counsel. The cause was continued several times for matters unrelated to this appeal.

On February 9, 2000, attorney Botti filed an amended motion for new trial on defendant's behalf. Attached to that motion were several affidavits. In the first affidavit, defendant averred that she was directed by attorney Elovitz to prepare notes regarding her interrogation by the police. Defendant averred that she never showed the notes to anyone except Elovitz and did not consent to disclosure of their contents. In the second affidavit, Roger Baker, an attorney, averred that he was in the courtroom and saw Kirschner pass several sheets of folded paper to an assistant State's Attorney during the sidebar discussion regarding the issue.

On February 28, 2000, the trial court denied defendant's motion for a new trial, and continued the matter for sentencing. On May 3, 2000, the trial court sentenced defendant to 32 years' incarceration. Defendant timely appeals.

ANALYSIS

Prosecutorial Misconduct in Use of Defendant's Notes

Defendant contends that she is entitled to a new trial because the State committed prosecutorial misconduct when it used her handwritten notes to impeach her at the suppression hearing and later at trial. Defendant argues that use of the notes violated the attorney-client privilege, the notes were improperly disclosed to the State without her consent, and the State "ambushed" her with their use at the suppression hearing and again at trial. Defendant cites *People v. Knippenberg*, 66 Ill. 2d 276 (1977) in support of her prosecutorial misconduct argument. In *Knippenberg*, the State impeached the defendant with statements made to a defense investigator. Our supreme court held that the State's use of the defendant's statements to the investigator was "volatile of the notion of a fair trial and completely offensive to the concept of the effective assistance of counsel," and reversed the defendant's conviction. *Knipenberg*, 66 Ill. 2d at 285.

The circumstances in the case before us do not warrant reversal. First, defendant has waived the privilege issue because she failed to object to the use of these statements or assert the attorney-client privilege during the suppression hearing or during trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.)) Defendant argues that we should not invoke the waiver rule because she would have been further prejudiced if forced to object to her own statements in front of the jury. See *Knippenberg*, 66 Ill. 2d at 287. However, this consideration plays no role

in our analysis; the suppression hearing was not tried before a jury, and the trial did not commence for more than a year after the suppression hearing – ample time for defense counsel to file a motion in limine to bar evidence of the notes.

Moreover, notwithstanding waiver, we find that the State committed no misconduct in its use of the notes. The State obtained the notes directly from attorney Elovitz, who memorialized the disclosure with a letter. There is no suggestion that the State obtained the notes surreptitiously or intentionally failed to disclose their existence. *Cf. Knippenberg*, 66 Ill. 2d at 286 (finding that the surprise to the defendant was complete). Although the record is unclear regarding Elovitz's motive for disclosing the notes, such disclosure was required if he beleived the notes were not privileged, or defendant intended to waive the privilege, and he intended to use them at trial, *e.g.*, to refresh her memory or rebut an inference of recent fabrication. See Supreme Court Rule 413(d)(ii) (132 Ill. 2d R. 413(d)(ii)). (We defendant's related ineffective assistance of counsel claim *infra*.) We find nothing on the face of the notes that would alert the State that they were subject to the attorney-client privilege. Moreover, defense counsel never informed the State that the notes had been disclosed in error, objected to their introduction, or otherwise asserted the attorney-client privilege on defendant's behalf. We will not impose on the State the obligation to independently examine all material obtained from defense counsel during the discovery process and second guess defense counsel's determination that the material was discoverable. Therefore, in light of defense counsel's failure to assert the attorney-client privilege, we find the State committed no misconduct when it used the notes at trial.

Denial of Defendant's Motion to Suppress

Defendant contends that the trial court erred when it denied her motion to suppress statements made to the police. Defendant argues that the police were required to provide the Miranda warnings because she was in custody during the interrogation. Defendant alternatively argues that her statements were not voluntary. Where, as here, a trial court's ruling on a motion to suppress a statement involves a factual determination and credibility assessments, a reviewing court will not disturb the ruling unless it is manifestly erroneous. *People v. Chapman*, 194 Ill. 2d 186, 214 (2000).

Whether a confession is voluntary is judged by the totality of the circumstances, which include the age, education, and intelligence of the accused; the duration of both the detention and the questioning; whether the accused was advised of her or his constitutional rights; and whether the accused was subjected to physical mistreatment. *Chapman*, 194 Ill. 2d at 214. A defendant is entitled to *Miranda* warnings during an interview if she or he is in police custody. *People v. Patterson*, 314 Ill. App. 3d 962, 973 (2000). In determining whether an interrogation is custodial, a court must consider whether a reasonable person in the defendant's position, innocent of any crime, would believe herself or himself to be in custody. *Patterson*, 314 Ill. App. 3d at 973. The relevant factors are similar to those in a voluntariness inquiry and a court must consider the location, time, mood and length of the interview; the number of police officers present; whether the defendant's family is present or absent; any indicia of formal arrest, such as physical restraint, the show of weapons or force, booking or fingerprinting; whether the accused is allowed to walk from the location of the interview unaccompanied

by the police; the age, intelligence, and mental makeup of the accused; and the manner by which the accused arrived at the place of the interview. *Patterson*, 314 Ill. App. 3d at 973; *People v. Patel*, 313 Ill. App. 3d 601, 605 (2000).

In this case, the evidence presented supports the trial court's finding that defendant was not entitled to the *Miranda* warnings and made her statements voluntarily. Defendant drove herself to the police station at approximately 7 p.m., a time mutually agreed upon with the investigating officer. The interview lasted approximately three hours. Two police officers interviewed defendant, and both testified that they did not wear or display weapons. Defendant was not fingerprinted, photographed, or subjected to the booking process. On at least one occasion, defendant was allowed to walk unaccompanied to the bathroom. Although Williams did display handcuffs near the end of the interview, we need not consider whether this show of force changed the nature of the interview because defendant made no subsequent statements. Defendant testified that she was not aware of her right to remain silent, but admitted that she consulted an attorney before agreeing to the interview. We determine that in light of the totality of the circumstances, the trial court's determination that defendant's statements were voluntarily made and were not the product of custodial interrogation was not manifestly erroneous. See *Chapman*, 194 Ill. 2d at 186.

Evidence of Assertion of Right to Counsel

Defendant contends that the State improperly introduced evidence that she asserted her right to counsel. Generally, the State cannot use a defendant's post-*Miranda*

silence for impeachment purposes without violating due process. *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98, 96 S. Ct. 2240, 2245 (1976); see also *People v. Dameron*, 196 Ill. 2d 156, 163 (2001). In *Doyle*, the Supreme Court held that, although the Miranda warnings do not contain an express assurance that a defendant's silence cannot be held against her or him, it would be fundamentally unfair to warn a defendant of her or his right to remain silent and subsequently use evidence of that silence to impeach her or his trial testimony. *Doyle*, 426 U.S. at 618, 49 L. Ed. 2d at 422, 96 S. Ct. at ___. The Supreme Court subsequently held that fundamental fairness requires application of the *Doyle* rule with equal force to post-*Miranda* requests for counsel. *Wainwright v, Greenfield*, 474 U.S. 284, 295, 88 L. Ed. 2d 632, 106 S. Ct. 634, ___ (1986). However, every violation of the *Doyle* rule is not *per se* a reversible error, and a violation may constitute harmless error. *People v. Dameron*, 196 Ill. 2d at 164.

In the present case, we are not required to consider the harmless error factors identified in *Dameron*, because we find no error in the State's inquiries. First, defendant has waived this issue for appeal by failing to object during trial. See *Enoch*, 122 111. 2d at 186. Second, regardless of defendant's waiver, we question whether the fundamental fairness analysis of *Wainwright* applies when, as here, the defendant has neither been arrested nor advised of the *Miranda* warnings. See *People v. Homes*, 274 Ill. App. 3d 612, 619 (1995) (holding the *Doyle* rule does not apply to impeachment with prearrest silence). Third, and most important, defendant first raised the issue of her contact with an attorney during her direct testimony describing the circumstances surrounding her statement to the

police. The prosecution may pursue a line of inquiry which the defendant has invited, and a defendant may not complain of cross-examination regarding testimony elicited by defense counsel. *People v, Reeves*, 228 Ill. App. 3d 788, 801 (1992). Therefore, we determine the State was entitled on cross-examination to further inquire regarding defendant's contact with counsel prior to her questioning by the police.

Postarrest Silence

Defendant contends that the State improperly introduced evidence of her exercise of the constitutional right to remain silent. Defendant argues that the State improperly introduced evidence that she did not contact Lynn C. or Cynthia C. to inquire regarding the victim's condition. However, the *Doyle* rule does not apply to silence toward private parties. *People v. Long,* 316 Ill. App. 3d 919, 931 (2000), citing *People v. Heidorn*, 114 Ill. App. 3d 933, 938 (1983). The holding of *Doyle* is limited to situations where the silence of the accused is induced by government action. *Long*, 316 Ill. App. 3d at 931, citing *Jenkins v. Anderson*, 447 U.S. 231, 240, 65 L. Ed. 2d 86, 95-96, 100 S. Ct. 2124, 2130 (1980). Therefore, the State did not improperly infringe on defendant's constitutional rights when it presented evidence of her failure to contact the victim's mother or grandmother.

Autopsy Evidence

Defendant contends that the trial court erred when it admitted Choi's testimony regarding his autopsy of the victim. Defendant argues that the testimony should have been excluded because the victim's body had been

embalmed before the autopsy. Rulings on the admission of evidence are within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Rozo*, 303 Ill. App. 3d 787, 789 (1999). Whether to admit expert testimony regarding a new scientific technique is also within a trial court's discretion, and Illinois follows the *Frye* standard for admissibility. *Rozo*, 303 Ill. App. 3d at 792. However, once it is established that a scientific method is generally accepted, a *Frye* test is no longer necessary each time the State seeks to use evidence obtained by that method. *Rozo*, 303 Ill. App. 3d at 793. A defendant may attack the actual procedures and application of the method, but such attack does not form the basis for a *Frye* hearing. *Rozo*, 303 Ill. App. 3d at 793.

In this case Choi testified that although the victim's body had been embalmed, he was able to recognize and compensate for the changes created by the embalming procedure. That a physician trained as a pathologist can examine a body during an autopsy and draw conclusions regarding the cause of death is a principle so well established in Illinois jurisprudence that even our examination of the earliest cases in Illinois revealed no challenge to the admissibility of such expert testimony. See *Sun Accident Ass'n v. Olson*, 59 Ill. App. 217 (1894) (admitting evidence of an autopsy). Although defendant cites cases supporting her argument that an embalming can affect the results of an autopsy, she cites no authority for the proposition that embalming renders evidence of an autopsy inadmissible. Defendant was free to cross-examine Choi regarding the effects of the embalming process and their effect on his opinion. Therefore, we conclude the trial court was not required to conduct a *Frye* hearing on the admissibility of

Choi's testimony and did not abuse its discretion when it admitted the evidence. See *Rozo*, 303 Ill. App. 3d at 793.

Defendant also argues that the trial court erred when it allowed Choi to describe the autopsy photos. The admission of photographs of a decedent is a matter that rests within the sound discretion of the trial court. *People v. Chapman*, 194 Ill. 2d 186, 219 (2000). If photographs are relevant to prove facts at issue, they are admissible and may be shown to the jury unless the prejudicial nature of the photographs outweighs their probative value. *Chapman*, 194 Ill. 2d at 219. The State is entitled to prove every element and relevant fact of the offense charged, and if autopsy photos are relevant to establish any such fact they are admissible despite their gruesome nature. *People v. Starks*, 287 Ill. App. 3d 1035, 1042 (1997).

We have examined the disputed photographs and find that they are indeed gruesome, *e.g.*, one photograph depicts the victim's head with the skin peeled away, the skull partially removed, and the brain exposed. However, we also find that these photographs were relevant to and probative of the extent of the injury to the victim's brain. The degree to which the victim's brain had atrophied is apparent to even an untrained eye, and the photographs are consistent with Choi's testimony. More importantly, we determine there was little potential for prejudice in the admission of these photographs because they were never published to the jury, and Choi described the photographs in a dry clinical manner that captured little of their gruesome nature. We further determine that allowing Choi to describe the photographs was necessary to create a complete record in the event that another witness challenged his findings. Therefore, we conclude that the trial court did not abuse its discretion when it admitted the

photographs into evidence and allowed Choi to describe their contents.

Other Irrelevant Evidence

Defendant contends that the State improperly introduced other irrelevant evidence. Defendant argues that the State improperly inquired regarding the DCFS investigation. We agree with defendant that the outcome of the DCFS investigation was of little or no relevance to the issue of whether defendant was guilty. See *People v. Mason*, 219 Ill. App. 3d 76, 81-82 (1991). However, any possible prejudice was substantially diffused when the trial court sustained defendant's objection to the State's question regarding the outcome of the investigation. See *People v. Perez*, 258 Ill. App. 3d 753, 759 (1994).

Defendant also argues that the State improperly introduced evidence that the victim was baptized prior to surgery. Generally, evidence is admissible if its probative value is not substantially outweighed by its prejudicial effect, and that determination is a matter with the trial court's discretion. *People v. Green*, 322 Ill. App. 3d 747, 757 (2001). We determine that evidence that Cynthia C. had the victim baptized is probative, to a limited extent, of her state of mind, but that this evidence also had the potential for prejudicially rousing the jury's sympathies. However, we need not determine whether the trial court abused its discretion when weighing this evidence. Defendant failed to contemporaneously object at trial depriving the trial court of the opportunity to weigh the probative value against the potential for prejudice and has therefore waived the issue on appeal. See *Enoch*, 122 Ill. 2d at 186.

Defendant also argues that the State improperly introduced evidence that defendant was insured and the victim was not covered by health insurance. We find that this evidence was relevant because defendant raised the issue of Cynthia C.'s failure to take the victim to a doctor during the week of August 8, 1994, presented evidence that Cynthia C. filed a civil suit against defendant shortly after the victim's injury, and testified that she did not contact the victim's family at the instruction of her insurance agent. However, we need not consider the prejudicial effect of this evidence because defendant failed to contemporaneously object at trial and has therefore waived the issue on appeal. See *Enoch*, 122 Ill. 2d at 186.

Instruction Regarding Voluntariness of Defendant's Statement to Police

Defendant contends that the trial court erred when it instructed the jury regarding the requirement for *Miranda* warnings during Leonas' testimony and the trial court's prior ruling that defendant's statements were voluntary. Defendant argues that the trial court communicated its personal opinion and improperly invaded the jury's right to determine whether she made a statement to the police. See *People v. White*, 241 Ill. App. 3d 291, 299 (1993).

A trial court has the discretion to determine which instructions the jury should receive and may *sua sponte* instruct the jury irrespective of whether either party submits instructions or the defendant objects to their presentation to the jury. *People v. Wells*, 241 Ill. App. 3d 141, 148 (1993) Supreme Court Rule 451(f) embodies this principle and provides that the rule's other provisions are not "intended to restrict the court's authority to give any

appropriate instruction during the course of the trial." 177 Ill. 2d R. 451(f).

The voluntariness of a confession is a matter to be determined by the trial court alone. *People v. Jefferson*, 184 Ill. 2d 486, 498 (1998). However, even if the trial court has found that a confession is voluntary, a defendant is entitled to present evidence to the trier of fact challenging the statement's reliability or truth. *Jefferson*, 184 Ill. 2d at 498. However, neither side should be allowed to argue the legality of a confession to the jury because doing so might prompt the jury to confuse a confession's legal credibility with its factual credibility. *People v. Medley*, 111 Ill. App. 3d 444, 448-49 (1983).

Our supreme court addressed this issue in *People v. Pittman*, 55 Ill. 2d 39 (1973). In *Pittman*, the defendant contended that he was prejudiced when the trial court informed the jury during trial that his statements had previously been held to be admissible. The trial court also instructed the jury that it would be instructed only to determine the credibility of the defendant's statements and that the trial court would determine voluntariness. The supreme court held that the trial court did not err because both remarks accurately reflected the law that applied to the case. *Pittman*, 55 Ill. 2d at 61. The supreme court further held that any potential for prejudice was alleviated when the trial court instructed the jury at the close of the case that its rulings should not be considered as reflecting on the facts or the verdict. *Pittman*, 55 Ill. 2d at 61.

More recently, this court considered a similar challenge in *People v. Ott*, 237 Ill. App. 3d 119 (1992) In *Ott*, defense counsel objected to a police officer's testimony

regarding a statement by the defendant, arguing that it was involuntary. The trial court overruled the objection remarking "the voluntariness of the statement has already been determined." *Ott*, 237 Ill. App. 3d at 123. The trial court subsequently instructed the jury that:

> "You have before you evidence that the defendant made a statement relating to the offense charged in the indictment. It is for you to determine whether the defendant made the statement, and if so, what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made." *Ott*, 237 Ill. App. 3d at 124.

This court held that this instruction properly instructed the jury to consider all of the circumstances of the statement, which would include its voluntariness, and concluded that the trial court's comments did not improperly direct the jury to find the statement was voluntary because the trial court had previously done so. *Ott*, 237 Ill. App. 3d at 124.

In the case before us, defense counsel asked a series of questions regarding the *Miranda* warnings. We believe, as the trial court did, that this series of questions had the potential of misleading the jury. Such questioning might lead the jury to conclude that it was called upon to determine the legality of the interview. In response to this questioning, the trial court instructed the jury that the *Miranda* warnings are not required in all circumstances and that it had found that defendant was at the police station voluntarily. The trial court subsequently instructed the jury with an instruction identical to the one approved in *Ott*.

Although defendant had the right to present the circumstances surrounding her statement to the jury, she had no right to try again before the jury the issue of whether *Miranda* warnings were required. See *Jefferson*, 184 Ill. 2d at 498; *Medley*, 111 Ill. App. 3d at 448-49. The trial court's instructions could not improperly remove consideration of the voluntariness of defendant's statement from the jury because, in a strict sense, that issue was never properly before the jury for consideration. See *Jefferson*, 184 Ill. 2d at 498. The trial court did not prevent defendant from presenting the circumstances of her statement to the jury, and the trial court's instructions reminded the jury that it was allowed to consider those circumstances. We find that the instructions given by the trial court did not misstate the law. We further find that any potential prejudice created by the trial court's comments regarding its pretrial rulings was alleviated by the subsequent instructions. See *Pittman*, 55 Ill. 2d at 61. We conclude that the trial court did not abuse its discretion when it instructed the jury. See *Wells*, 241 Ill. App, 3d at 148.

Brady Violation

Defendant contends that the State committed a *Brady* violation when it failed to turn over notes written by Kirschner during Leestman's testimony. Defendant presents a two-fold argument in support of this contention; (1) the State's failure to turn over the notes violated her constitutional right to due process, and (2) the State's failure to turn over the notes violated Supreme Court Rule 412 (134 Ill. 2d R. 412). Defendant's constitutional arguments rely on *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed.

2d 215, 83 S. Ct. 1194 (1963) and *California v. Trombetta*, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984).

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or innocence, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218, 83 S. Ct. at 1194. The Supreme Court cases subsequent to *Brady*, and the lower court cases interpreting them, have focused on the issue of materiality. See, *e.g.*, *People v. Walls*, 323 Ill. App. 3d 436, 444 (2001). Favorable evidence is material, and constitutional error results from its suppression by the state when there is a reasonable probability that, if the evidence had been disclosed to the defense, the result of the proceeding would have been different. *Walls*, 323 Ill. App. 3d at 444.

In *Trombetta*, the Supreme Court addressed the related issue of the state's obligation to preserve evidence. The Court limited the state's duty to preserve evidence to evidence that is constitutionally material – evidence that both possesses an exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means. Roberta, 467 U.S. at 489, 81 L. Ed. 2d at 422, 104 S. Ct, at ___. However, unlike a *Brady* violation, the failure to preserve potentially useful evidence does not constitute a denial of due process unless the defendant can show bad faith on the part of the police. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 289, 109 S. Ct. 333, ___ (1988).

In this case, the State tendered one note written by Kirschner to the trial court for an *in camera* inspection. Defendant alleges that Kirschner wrote additional notes that were destroyed by the State. Defendant argues the State destroyed the additional notes in bad faith to circumvent the trial court's discovery order, and therefore, we may presume that they contained *Brady* material. In support of this argument defendant cites *People v. Hobley*, 182 Ill. 2d 404 (1998). We note, however, that defendant has provided no pinpoint citation in support of this argument, and we have found no language supporting such a presumption.

The standard defendant proposes commingles the *Brady* and *Youngblood* analyses, and we find no support for this commingling in *Hobley*. In *Hobley*, our supreme court found that the defendant's postconviction petition set forth allegations supporting a *Brady* violation related to the State's failure to disclose the existence of a gas can in the possession of the police. *Hobley*, 182 Ill. 2d at 438. In reaching this conclusion, the supreme court applied the *Brady* materiality standard. 182 Ill. 2d at 435-37. Our supreme court also held that the defendant's allegation that the State destroyed the gas can after trial supported a violation of due process under the *Youngblood* test. *Hobley*, 182 Ill. 2d at 442. The court found that the State's destruction of the gas can shortly after defendant issued a subpoena for information relating to the case in the postconviction proceeding supported an inference of bad faith. *Hobley*, 182 Ill. 2d at 440. Although our supreme court found that similar facts supported two distinct constitutional violations, we find nothing in the language of *Hobley* to suggest that the bad faith analysis of

Youngblood should be applied as a substitute for the *Brady* materiality standard.

Although we have determined that the good or bad faith of the prosecution is irrelevant to our *Brady* analysis, we feel compelled to comment nonetheless on the State's failure to preserve Kirschner's notes. We note parenthetically that a careful reading of the record reveals only that the State failed to tender the notes, if they existed, to the trial court; it does not suggest that the notes were intentionally or accidentally destroyed. However, this is a distinction without difference because the notes were never made a part of the record on appeal, and we have been deprived of the ability to independently examine them. The duty of the prosecution is not simply to secure a conviction; instead, it is a basic principle of our criminal justice system that prosecutors owe defendants a duty of fairness. See *People v. Derr*, 316 Ill. App. 3d 272, 275 (2000). We have examined the record and find, as the State suggests, that it was possible that the assistant State's Attorney involved in this argument was initially confused regarding whether she was required to tender only the single note given to her by Kirschner or all notes written by Kirschner whether given to her or cocounsel. However, absent from the record is any indication that the prosecution attempted to correct this mistake by tendering the remaining notes, or otherwise preserve for the record the substance of those notes. We find it irrelevant whether this failure constitutes an intentional effort to avoid the trial court's discovery orders or simply sloppy advocacy. In either case the State failed to fulfill its duty of fairness. We strongly admonish the State to avoid such failures in the future.

Returning to the merits of defendant's *Brady* contention, because we have been deprived of the notes themselves, we will assume, *arguendo*, that their contents would have been useful to defendant. However, the failure to provide a defendant with useful evidence only rises to the level of a constitutional violation when the evidence is material. See *Walls*, 323 Ill. App. 3d at 444. Constitutional error results from the suppression of favorable evidence only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Walls*, 323 Ill. App. 3d at 444, citing *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494, 105 S. Ct. 3375, 3383 (1985).

Defendant argues that the destroyed notes would have been useful (1) to prepare additional testimony by Leestma or (2) in cross-examining Kirschner regarding bias toward the prosecution. We determine that regardless of the contents of the notes, their availability to defendant would not have changed the outcome of the trial. First, the notes would have added little to the preparation of additional testimony by Leestma. The trial court had previously ruled that as a matter of fairness, Leestma would be allowed to remain in the courtroom to observe Kirschner's testimony and testify in surrebuttal in the same manner that Kirschner was allowed to observe and comment on Leestma's testimony. Accordingly, we determine that Leestma had an ample opportunity to learn the substance of Kirschner's testimony for possible surrebuttal. Second, the trial court expressly ruled that defense counsel could cross-examine Kirschner regarding his relationship with the prosecution including sitting at counsel table and passing notes to the prosecutor. We believe that Kirschner's active assistance to the prosecution by passing

notes to the prosecutors during Leestma's testimony was probative of any bias in favor of the State even if the content of the notes was not revealed to the jury. We determine that although the destroyed notes might have been useful to the defense, defendant had available adequate alternative means of subjecting Kirschner's testimony to adversarial testing. Moreover, Kirschner was not the State's only opinion witness, and the trial court ruled that as a rebuttal witness he could only comment on Leestma's testimony and could not express an independent opinion regarding the cause of death. Therefore, we conclude that the State's failure to turn over all of [the] notes did not create a reasonable probability that the outcome of the trial would have been different, and no *Brady* violation occurred.

Defendant alternatively argues that the State's conduct violated the trial court's discovery orders. When evidence has been destroyed following a defense request under Rule 412, the proper sanction is a decision appropriately left to the discretion of the trial court. *People v. Newberry*, 166 Ill. 2d 310, 318 (1995). In light of the alternatives available to defendant identified above, we cannot find that the trial court abused its discretion when it refused to sanction the State for the failure to tender all of Kirschner's notes.

Closing Argument

Defendant contends that the State committed various reversible errors during closing argument. It is well established that prosecutors are afforded wide latitude during closing argument. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). When reviewing a challenge to comments

made by the State, the comments must be considered in the context of the entire closing arguments of the parties. *Williams*, 192 Ill. 2d at 573. Reversal is required only if the errors in the closing arguments result in substantial prejudice such that absent the complained-of remarks the outcome would have been different. *Williams*, 192 Ill. 2d at 573, citing *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993).

The State contends that defendant has waived any objection to the allegedly prejudicial comments by failing to contemporaneously object. See *Williams*, 192 Ill. 2d at 573. However, waiver is a limitation on the parties not the courts, and in the interests of defendant's right to a fair trial, we decline to apply the waiver doctrine to this contention. See *People v. Blue*, 189 Ill. 2d 99, 127 (2000).

Defendant argues that the State committed reversible error by making constant improper references to the victim's family. Generally, evidence that the victim of a crime is survived by a family is irrelevant to the guilt or innocence of a criminal defendant. *Blue*, 189 Ill. 2d at 129. However, incidental evidence of a victim's family is not only permissible, but in most trials, unavoidable because murder victims "do not live in a vacuum." *Blue*, 189 Ill. 2d at 131, quoting *People v. Easley*, 148 Ill. 2d 281, 335 (1992).

In this case, the State referred to the victim's mother's expectations for her child and how those expectations changed after he was injured. We find that these comments were relatively brief and properly based on the evidence. During trial, defendant presented evidence suggesting that the victim was malnourished and developmentally delayed. Defendant also presented evidence suggesting that Cynthia C. was a drug dealer who failed to

provide adequate food or medical care for the victim, and defendant argued that Cynthia C. was responsible for the victim's injuries. In light of this evidence we find that the State's remarks were properly intended to highlight the conflicting evidence suggesting that the victim was a normally developing infant prior to his injury, that Cynthia C. was a caring mother, and that the victim's physical and mental capacities were significantly altered after his injury and ultimately caused his death. We conclude that when viewed in context, the State's remarks regarding the victim's family were not improper – they were based on the evidence and did not exceed the latitude given the State to comment on the evidence.

Defendant also argues that the State made comments disparaging the integrity of defense counsel. It is generally improper for the State to make comments disparaging the integrity of defense counsel and implying that the defense presented was fabricated at the direction of counsel. *People v. Laugharn*, 297 Ill. App. 3d 807, 812 (1998). However, there is nothing improper in suggesting that defense counsel's arguments are immaterial or irrelevant. *People v. Hicks*, 101 Ill. App. 3d 238, 243 (1981).

During closing argument, defense counsel argued that the police failed to interview neighbors, process defendant's home as a crime scene, or interview the family of the victim's father. During rebuttal, the State urged the jury to "keep your eye on the ball" and ignore "red herrings." The State argued that additional interviews or a crime scene investigation would not have yielded additional evidence. We find that these arguments were not intended to disparage defense counsel, but were instead merely responses to defense counsel's attempts to focus on alternative theories the State believed were

supported by little or no evidence. See *Laugharn*, 297 Ill. App. 3d at 812 (holding "another little misdirection play here" to be a proper response to defense counsel's arguments); *Hicks*, 101 Ill. App. 3d at 243 (holding the prosecution's characterization of defense counsel's arguments as "red herrings" proper). The State also remarked that defense counsel "spoon fed" answers to defendant. We find that viewed in context, this was proper and intended only to focus the jury's attention on defendant's demeanor as a witness. The State argued that Janisko's opinion that something was wrong with the victim before August 11, 1994, originated with defendant. This was reasonable inference in light of Janisko's testimony that he only saw the victim once and never participated in his care. The State also argued that Leestma admitted in his book that testimony like that he delivered was a defense trick. Leestma admitted that he wrote that such testimony was "often exploited by defense counsel" and a fallacious interpretation. Although, we are uncomfortable with the use of the phrase "defense trick," we find nevertheless that viewed in context, this argument constituted fair comment on Leestma's testimony and his credibility and was not intended to disparage the integrity of defense counsel. We conclude, after examining each of the allegedly prejudicial remarks in context, that the State's arguments constituted proper commentary on the evidence and did not improperly disparage the integrity of defense counsel or imply that the defense was fabricated at their direction. See *Laugharn*, 297 Ill. App. 3d at 812.

Defendant argues that the State made improper arguments not based on the evidence. The wide latitude given a prosecutor during closing argument does not extend to allow her or him to argue facts not based on the evidence. *People v. Jones*, 240 Ill. App. 3d 213, 227 (1992).

Defendant argues that the State improperly implied that defense counsel suppressed an unfavorable opinion from an expert witness. The State argued that Soter gave an "opinion" to defense counsel. Soter actually testified that she reviewed the victim's medical records at the request of defense counsel. We believe that it is a reasonable inference that, after being contacted by defense counsel and reviewing the medical records, Soter formed an opinion and communicated it in some fashion to defense counsel. We find that this remark was based on the evidence and was not intended to suggest improper conduct by defense counsel.

Defendant also argues that the State's argument that defendant had a motive to harm the victim was not based on the evidence. This remark was part of a larger argument that the victim was difficult to care for and disrupted defendant's schedule. We find that, although little evidence was presented regarding motive, the record contains sufficient evidence to support these inferences. Therefore, we find that this argument was not improper.

Defendant finally argues that the State improperly shifted the burden of proof when it argued that defendant could have subpoenaed the victim's father, Matthew S. Although it is generally improper to comment on a defendant's failure to produce any witness, such comment is allowed if the defendant injects the witness into the case. *People v. Armstead*, 322 Ill. App. 3d 1, 16 (2001). During closing argument, defense counsel argued that Matthew S. was the only person who could corroborate Cynthia C.'s account of her actions after picking up the victim on August 11, 1994. Defense counsel further argued that he did not call Matthew S. as a witness for the defense because he would have been required to vouch for his

credibility. The trial court sustained the State's objection to this argument. Defense counsel clearly created an issue regarding the State's failure to call Matthew S., and suggested that defendant could not do so herself. Therefore, we find that defense counsel invited the State's remark that defendant had a right to subpoena Matthew S.

Defendant finally argues that the State improperly argued that defendant had committed prior bad acts when it argued that she was responsible for the victim's injury on August 8. Generally, evidence of prior bad acts may not be introduced merely to establish a defendant's propensity to commit crime, but is admissible for any other proper purpose. *People v. Rohlfs*, 322 Ill. App. 3d 965, 968 (2001). Defendant presented the theory that the victim died as the result of an injury inflicted as long as 11 days prior to August 11. Therefore, evidence of any head injury suffered during that time frame was relevant. Moreover, the State did not argue that the August 8 injury reflected a propensity to harm the victim on August 11; rather, the State argued that defendant's inconsistent statements regarding the August 8 injury reflected on her credibility. Therefore, we conclude that the State did not improperly introduce evidence of prior bad acts or argue that defendant had a propensity to commit the offense charged.

Involuntary Manslaughter Instruction

Defendant contends that the trial court improperly refused to give her tendered instruction on the lesser included offense of involuntary manslaughter. Generally a defendant may not be convicted of an offense for which she or he has not been charged. *People v. Williams*, 315 Ill.

App. 3d 22, 31 (2000). However, in an appropriate case, a defendant is entitled to have the jury instructed on less serious offenses that are included in the charged offense. *Williams*, 315 Ill. App. 3d at 31. If some evidence that would reduce the charged offense of first degree murder to involuntary manslaughter has been presented, an involuntary manslaughter instruction should be given. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Whether to instruct the jury on a lesser included offense is a matter within the trial court's discretion. *People v. Garcia*, 188 Ill. 2d 265, 283 (1999). However, where some evidence supports the instruction, the trial court's failure to give a requested instruction constitutes an abuse of discretion. *DiVincenzo*, 183 Ill. 2d at 249. The amount of evidence required has been variously described as "any," "some," or "slight," or "very slight." *Garcia*, 188 Ill. 2d at 284, quoting *People v. Novak*, 163 Ill. 2d 93, 108-09 (1994).

The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct resulting in the victim's death. *People v. Daniels*, 301 Ill. App. 3d 87, 95 (1998). To prove defendant guilty of murder the State was required to establish that defendant acted knowingly. Section 9-1 (a)(2) of the Criminal Code of 1961 (the Criminal Code) states that a defendant acts with the mental state required for first degree murder if "[she or] he knows that such acts create a strong probability of death or great bodily harm." 720 ILCS 5/9-1(a)(2) (West. 1994). Involuntary manslaughter requires that the defendant perform the acts causing a victim's death recklessly. 720 ILCS 5/9-3(a) (West. 1994). The Criminal Code defines recklessness as follows:

> "A person is reckless or acts recklessly, when [she or] he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West. 1994).

The criminal code defines knowingly as follows:

> "A person knows, or acts knowingly or with knowledge of:
>
> * * *
>
> (b) the result of [her or] his conduct, described by the statute defining the offense, when [she or] he is consciously aware that such result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West. 1994).

Whether an instruction on the lesser included offense of involuntary manslaughter is warranted depends on the facts and circumstances of each case. *DiVincenzo*, 183 Ill. 2d at 251. The issue often arises in cases involving mutual combat and courts consider a variety of factors including: (1) the disparity in size and strength between the defendant and the victim; (2) the brutality and duration of the beating, and the severity of the victim's injuries; (3) whether the defendant used his bare fists or a weapon such as a gun or a knife. *DiVincenzo*, 183 Ill. 2d at 250-51. However, these factors are not dispositive and serve only to gauge the degree of risk created by the defendant's conduct from which the defendant's mental state can be inferred. See *DiVincenzo*, 183 Ill. 2d at 250.

Conduct that creates a strong probability of death or great bodily harm includes, for example, a severe and

vicious beating of a helpless victim. See *Daniels*, 301 Ill. App. 3d at 96 (holding involuntary manslaughter instruction not warranted when the defendant placed a sock in the mouth of a victim already weakened by a beating). Conduct that creates the risk of death, but not a strong probability of death or great bodily harm includes, for example, leaving an infant unattended in a parked car on a summer day. See *People v. Kolzow*, 301 Ill. App. 3d 1, 6 (1998). When the jury must evaluate the credibility of witnesses and weigh the evidence to reach a conclusion regarding the degree of risk associated with a defendant's conduct, the defendant is entitled to have the jury instructed on both first degree murder and involuntary manslaughter. *DiVincenzo*, 183 Ill. 2d at 252.

In the case before us, there was no direct evidence of the cause of the victim's injuries, and the jury was required to reach conclusions regarding the cause of these injuries largely from the testimony of medical experts. However, we determine that the medical evidence, by itself, presented the jury with something of an all or nothing proposition.

The State's medical experts likened the force necessary to cause the victim's injuries to a fall from several stories or an unrestrained car accident. They testified that such injuries result only from repeated shaking. They also testified that a child who suffers injuries as severe as the victim's will show symptoms immediately, including coma and seizures, and if untreated will probably die within hours of the injury. In short, the State's medical experts described an injury mechanism that created a strong probability of death.

Defendant's medical expert did not testify that the victim's injuries were the result of a rare phenomenon or unlikely to result from the cause identified by the State's experts. See *DiVincenzo*, 183 Ill. 2d at 251. Nor did defendant's expert testify that injuries like those suffered by the victim could be caused by a less severe shaking. Instead defendant's expert opined that the victim's injuries might have been caused by an unrelated injury days or weeks earlier.

We conclude that the medical testimony, standing alone, accorded no middle ground to the cause of the victim's injuries. If the jury accepted the testimony of the State's witnesses it would be forced to conclude that the injuries were caused by conduct that created a substantial risk of death. If the jury rejected the testimony of the State's witness and accepted the testimony of defendant's expert the cause of the injuries could not be determined. We find nothing in the medical evidence suggesting that the cause of the victim's injuries was conduct that created a risk, but not a substantial risk, of injury. For example, no medical exert testified that injuries like those suffered by the victim were an unusual result of picking up an infant too quickly without supporting its head. Therefore, we determine that the medical evidence did not support the inference the conduct which caused the victim's injuries created a risk of death or injury less than the substantial probability required for first degree murder. Accordingly, the medical evidence did not support the further inference that the person who caused the injuries acted recklessly rather than knowingly.

Our conclusion regarding the medical evidence is consistent with recent cases which held that shaking a baby creates a risk of harm consistent with knowing

rather than reckless conduct. See *People v. Coleman*, 311 Ill. App. 3d 467, 475 (2000); *People v. Ripley*, 291 Ill. App. 3d 565, 569 (1997). In *Coleman*, the reviewing court rejected the defendant's argument that his admission that he shook the victim to revive him refuted a finding that he acted knowingly. *Coleman*, 311 Ill. App. 3d at 476. In *Ripley*, the reviewing court held that the evidence supported a conviction for aggravated battery to a child when the defendant testified that he shook the victim to settle him down. *Ripley*, 291 Ill. App. 3d at 569.

A defendant's testimony may warrant an involuntary manslaughter instruction if the jury could conclude that she or he acted recklessly when she or he shook the victim for an otherwise proper reason, *e.g.*, because the victim was vomiting (see *Coleman*, 311 Ill. App. 3d at 472), to calm the victim (see Ripley, 292 Ill. App. 3d at 567), or in an attempt to revive the victim because she or he stopped breathing (see *People v. Renteria*, 232 Ill. App. 3d 409, 416 (1992)). However, in the case before us, defendant did not testify that she shook the victim with such a purpose. Instead, she denied ever shaking the victim. More importantly, defendant admitted that she knew that shaking a baby created the strong probability of death or great bodily harm.

We conclude that, viewed in isolation, the medical evidence and defendant's testimony supported only two possible verdicts. If the jury found the testimony of the State's medical experts credible, the defendant acted knowingly and was guilty of first degree murder. Alternatively, the jury could find defendant not guilty either because it found her testimony credible and concluded that someone else was responsible for the victim's injuries, or because it found Leestma's testimony credible and

concluded that the victim's injuries were not the result of shaken baby syndrome. Therefore, we determine that an involuntary manslaughter instruction was not warranted by this evidence.

However, defendant argues that other evidence supported an involuntary manslaughter instruction. A defendant is entitled to an instruction on any lesser included offense supported by any evidence in the record, even if the theory of the defense is inconsistent with the possibility that the defendant is guilty of the lesser charge (*People v. Smith*, 261 Ill. App. 3d 117, 119 (1994)) or the facts which support the lesser offense are inconsistent with the defendant's own testimony (see *People v. Rodriquez*, 96 Ill. App. 3d 431, 436 (1981)).

Defendant argues that she was entitled to an involuntary manslaughter instruction because in a prior civil suit Cynthia C. alleged that defendant acted recklessly. We find this evidence irrelevant to the issue of defendant's guilt. Defendant cites no authority for the proposition that allegations made by a victim's family in a civil suit constitute judicial admissions binding on the State in a related criminal prosecution. To the contrary, the law in Illinois is clear that it is within the discretion of the State to determine what charges are to be brought when an offense has been committed. *People v. Gill*, 264 Ill. App. 3d 451, 456 (1994). A State's Attorney is the representative of the people, and the State's Attorney, not the victim or the victim's family, controls criminal prosecutions. See *State v. Whittington*, 260 Kan. 873, 879, 926 P. 2d 237, 241 (1996). Whether Cynthia C. believed that defendant acted knowingly is irrelevant to either the State's decision to prosecute defendant for first-degree murder or the jury's determination that defendant acted knowingly.

Moreover, given the differing standards for liability in criminal and civil cases, we find that the strongest inference to be drawn from the language of the civil complaints is that Cynthia C., or her attorney, hoped to impose civil liability on defendant for the victim's injuries without describing the actions that caused those injuries in language that would prevent a recovery from defendant's insurer. See *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080 (2000) (construing "accident" in claim related to assault and battery); *American Family Mutual Insurance Co. v. Chiczewski*, 298 Ill. App. 3d 1092 (1998) (construing "physical abuse of a minor" exclusion).

Defendant also argues that the evidence supports a finding that the victim was injured tumbling, dancing with defendant, or when a one-year-old stepped on him. Although defendant denied that any of these events occurred and denied making prior statements that they did occur, she argues that Cynthia C. and Leonas testified that defendant made such statements shortly after the victim's injury. However, we do not conclude that this evidence entitled defendant to an involuntary manslaughter instruction. It is well established that an act performed accidentally, carelessly, or even negligently is insufficient to prove or sustain a conviction for involuntary manslaughter. *People v. Buckley*, 282 Ill. App. 3d 81, 89 (1996). The alternative causes of the victim's injury defendant identifies constitute mere accidents or, at worst, negligence. There was no evidence from which the jury could find that if defendant tumbled or danced with the victim, or failed to prevent another child from stepping on him, that she acted in a reckless manner – that she exhibited a disregard for the risk of injury that constituted a gross deviation from the standard of care. See 720 ILCS 5/4-6

(West 1994); *Buckley*, 282 Ill. App. 3d at 89. In other words, if the jury found any of these other possible causes resulted in the victim's injuries, defendant was entitled to an acquittal, not a conviction on the lesser offense of involuntary manslaughter. Therefore, we conclude that in light of all the evidence presented, the trial court did not abuse its discretion when it denied defendant's tendered involuntary manslaughter instruction.

Sufficiency of the Evidence

Defendant contends that the State failed to prove her guilty beyond a reasonable doubt of first degree murder. A reviewing court will not disturb a defendant's conviction unless the proof is so improbable or unsatisfactory that a reasonable doubt exists as to the defendant's guilt. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). We must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Williams*, 193 Ill. 2d at 338. A reviewing court will not substitute its judgment for that of the trier of fact on issues regarding the weight of evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). Circumstantial evidence is sufficient to support a conviction if it is inconsistent with any reasonable hypothesis of innocence, but the trier of fact is not required to search out all possible explanations consistent with innocence and elevate them to the level of reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 332 (2000).

Under the State's theory of the case, it was required to prove (1) that defendant committed the acts that caused that death of the victim, and (2) defendant knew that

those acts created a strong probability of death or great bodily harm. 720 ILCS 5/9-1(a)(2) (West 1994).

Defendant argues that the State failed to prove that the injuries the victim allegedly suffered on August 11, 1994, caused his death in December 1995. In response to the increasing sophistication of modern medicine, Illinois has eliminated the common-law year-and-a-day rule. *People v. Carrillo*, 164 Ill. 2d 144, 150 (1995). Consequently, a defendant may be convicted of murder even if doctors are able to prolong the victim's life for years after a fatal injury. *Carrillo*, 164 Ill. 2d at 150. The medical evidence presented in this case established that the victim never regained consciousness after August 11, 1994, and remained in a vegetative state until he died. The State presented expert testimony that the injuries suffered by the victim left him unusually susceptible to pneumonia and that pneumonia ultimately caused his death. Therefore, we determine that the State presented sufficient evidence to establish that the injuries sustained by the victim on or about August 11, 1994, were the cause of his death.

Defendant also argues that the State failed to prove that the victim's injuries were sustained on August 11, 1994. Defendant argues that Leestma's testimony created reasonable doubt regarding the cause and timing of the victim's injuries.

At trial, the State presented the testimony of one medical expert after another. Every physician that treated the victim, and every expert who rendered an opinion for the State testified that the victim's injuries were consistent with and distinctive of shaken baby syndrome. Each witness testified that the victim's injuries occurred the

same day he arrived at the emergency room, and that the victim would begin to display symptoms almost immediately after his injury. Cynthia C. testified that the victim appeared well in the morning, and Jacobazzi testified that the victim appeared well at 3:15 p.m. on August 11, 1994. Cynthia C. testified that at approximately 5 p.m on August 11, the victim appeared to be in a deep sleep and appeared to be stretching. A rational trier of fact could find that this testimony was consistent with the medical testimony that a shaken baby would often appear to be asleep immediately after being shaken and that as the injury progressed the baby would often begin "posturing."

Leestma testified that the victim could have had a older bleed/rebleed type injury. However, Leestma's testimony was effectively impeached with prior inconsistent statements. Leestma's prior writings were both contrary to his testimony at trial and consistent with the testimony of the State's medical experts. Moreover, it is the role of the jury to weigh testimony and determine the credibility of competing expert testimony, just as it is the jury's role to evaluate the testimony of lay witnesses. *People v. Gregg*, 315 Ill. App. 3d 59, 75 (2000). Therefore, we determine that a rational jury could choose to accept the testimony of the State's medical experts and reject Leestma's conflicting testimony.

Defendant finally argues that the State failed to prove that she injured defendant. Defendant argues that the State failed to produce an eyewitness to the shaking and the State presented no evidence of a motive for shaking the victim. Defendant further argues that Cynthia C. had a motive to fabricate her testimony because she was a 19 year old single mother, was a convicted felon, did not have

health insurance for the victim, and had filed a civil suit against defendant.

Although there was no eyewitness to the shaking, the jury was presented with ample circumstantial evidence to infer that defendant injured the victim. The medical evidence, although not entirely consistent, provided both an upper and lower limit for the time of the victim's injury. Bauer testified that the victim was injured between two and eight hours before the CT scan was taken. Quaid testified that the victim was injured between 2 and 12 hours before he arrived at the hospital. Soter testified that the victim was injured while at defendant's home. Alexander testified that the victim was injured in the mid to late afternoon. Other evidence narrowed the possible time frame for the victim's injuries to the late afternoon. Each physician, except Leestma, who expressed an opinion testified that the victim would have shown symptoms immediately. Defendant's testimony that the victim ate while at her home, and Jacobazzi's testimony that the victim appeared fine on the way to the park at 3:15 p.m., narrow the possible time for the injury to sometime after 3:15 p.m., a time frame consistent with the medical testimony. It is undisputed that defendant was the only adult present with the victim during this time period until Cynthia C. picked him up.

Accordingly, if the jury found that the victim was injured as the result of shaking on August 11, 1994, it was faced with two possible scenarios, either defendant shook the victim before Cynthia C. picked him up, or someone else shook him shortly after he left defendant's home. Although the medical evidence did not conclusively exclude the possibility that the victim was shaken after Cynthia C. picked him up, such a possibility falls at the

outer limits of the time frame identified by the experts, and that time frame extended well into the period during which defendant was the only adult caring for the victim. Cynthia C.'s testimony supports the inference that the victim was injured before he left defendant's home. Cynthia C. testified that contrary to usual routine, defendant had packed the victim's diaper bag before she arrived to pick him up. Cynthia C. also testified that the victim had never been sleeping or in a playpen when she picked him up on prior occasions. The medical evidence was consistent with Cynthia C.'s description of the victim's condition. Although Cynthia C. certainly had a motive to lie if she was responsible for the victim's injuries, defendant had an equally powerful motive to lie. More importantly, the jury accepted Cynthia C.'s testimony over defendant's, and it is not our role to substitute our own determination of credibility for that of the jury. See *Cooper*, 194 Ill. 2d at 431. We determine that a rational trier of fact could infer that defendant was responsible for the victim's injuries.

Defendant finally argues that she had no motive to injure the victim and no record of abusing other children. The State presented little evidence establishing a motive for defendant to injure the victim, and no evidence that she had injured any other child. Defendant was entitled to present evidence of her good reputation for peacefulness, and did so. See *People v. Reid* 272 Ill. App. 301 (1995). However, motive is irrelevant when the evidence established beyond a reasonable doubt that the defendant killed the victim. *People v. Wages*, 261 Ill. App. 3d 576, 587 (1994). This may have been an isolated incident and completely contrary to defendant's character but the jury was not required to find that defendant harbored any animosity toward the victim or had ever shaken a baby

before. Therefore, we determine that, even without evidence of a motive, a rational trier of fact [ ] could find that defendant killed the victim.

We conclude that when viewed in the light most favorable to the prosecution the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt.

Ineffective Assistance of Counsel

Defendant also contends that she was denied the effective assistance of counsel. Illinois follows the two-part *Strickland* test for ineffective assistance of counsel claims. *People v. Albanese*, 104 Ill. 2d 504, 526 (1984), adopting the rule in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. To establish ineffective assistance, a defendant must show that (1) counsel's performance was ineffective and (2) that the defendant was prejudiced as a result. *Albanese*, 104 Ill. 2d at 525-26. A reviewing court may proceed directly to the second prong of the *Strickland* test and need not examine the effectiveness of counsel in the absence of prejudice. *People v. Edgeston*, 243 Ill. App. 3d 1, 12 (1993), citing *People v. Enoch*, 146 Ill. 2d 44, 56-57 (1991).

Defendant argues that she has presented 44 specific allegations of ineffective assistance, and that we must consider the cumulative effect of these errors. Although we could proceed directly to the second prong of the *Strickland* analysis and determine whether the cumulative effect of these errors prejudiced defendant, we believe that our analysis is simplified by addressing individually various classes of errors defendant has identified.

Defendant first argues that she was denied the effective assistance because her attorney withdrew her speedy-trial demand. Defendant argues that she was prejudiced because this action unnecessarily exposed her to first degree murder charges because the State would otherwise have been forced to try her for the lesser battery charges before the victim's death. Defendant cannot establish the prejudice she alleges, because this allegation of prejudice is based on a faulty premise.

Double jeopardy does not bar a prosecution for murder following a trial for battery or other lesser included offense, if the victim dies after the first trial. *Carrillo*, 164 Ill. 2d at 148, citing *Diaz v. United States*, 223 U.S. 442, 56 L. Ed. 500, 503, 32 S. Ct. 250, 251 (1912) Bringing defendant to trial on the battery charges before the victim's death would not have barred a subsequent murder trial because the additional fact necessary to sustain a murder charge, the victim's death, would not have occurred. See *Carrillo*, 164 Ill. 2d at 148. Defendant suffered no prejudice with regard to the battery charges because she was neither tried nor convicted of those offenses. Therefore, we conclude that because defendant cannot establish prejudice, she was not denied the effective assistance of counsel as a result of the speedy-trial waiver.

Defendant also argues that she was denied the effective assistance of counsel because attorney Elovitz disclosed her handwritten notes to the prosecution in violation of the attorney-client privilege. Defendant further argues that Montemurro was ineffective because he failed to discover Elovitz's disclosure before the suppression hearing and failed to object to their use based on the attorney-client privilege either at the suppression hearing or at trial.

We presume that defense attorneys pursue sound trial strategies. *People v. Simms*, 322 Ill. App. 3d 397, 406 (2001). Accordingly, we will presume that Elovitz disclosed the notes to the prosecution because he believed the notes would be useful at trial, *e.g.*, to refresh defendant's memory, and he believed that the disclosure was required. On the other hand, if Elovitz's conclusions regarding privilege and disclosure were based on faulty legal premises, trial strategy will not insulate his actions from the *Strickland* analysis. See *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999). However, we need not consider further whether trial strategy supported Elovitz's disclosure of the notes. Even if an attorney's conduct violates the attorney-client privilege, a defendant must still demonstrate that she or he has been prejudiced by the violation. See *Wemark*, 602 N.W.2d at 817 (holding that the defendant was not prejudiced when his attorney disclosed the location of a murder weapon to the police under the mistaken belief that such disclosure was mandated by the rules of profession[al] conduct). Similarly, the failure to object to the admission of evidence that allegedly violates the attorney-client privilege does not constitute ineffective assistance of counsel absent prejudice to the defendant. See *Nickel v. Hannigan*, 97 F.3d 403, 408-09 (10th Cir. 1996).

Therefore, the issue before is whether defendant can establish prejudice resulted from the allegedly improper disclosure of the notes. Defendant argues that the State used the notes to impeach her credibility both at the suppression hearing and at trial, and the State's use of the notes "completely undermined" her strategy at the suppression hearing.

We agree with defendant that the State's use of her notes affected her credibility during the suppression

hearing. However, to establish prejudice, defendant must demonstrate that the effect on her credibility was sufficient to affect the outcome of the proceedings. See *Edgeston*, 243 Ill. App. 3d at 12. We do not determine that the effect on defendant's credibility was sufficient to change the outcome of the proceedings.

First, nothing in the notes contained an admission of guilt or directly contradicted defendant's testimony. The contradictions between defendant's testimony and her notes were minor, *e.g.*, whether she arrived at the police station at 7:30 or 8:30 p.m. or whether Williams *displayed* handcuffs or *placed* the handcuff[s] on her wrists.

Second, the State used the notes primarily to impeach defendant by demonstrating that she omitted certain information from the notes. However, defense counsel rehabilitated defendant's credibility on this issue by eliciting testimony that the notes were not intended as a complete record of her interaction with the police. The potential for prejudice was further reduced when defense counsel used the notes on redirect examination to bolster defendant's credibility by highlighting the areas in which the notes did corroborate her testimony.

Finally, we note that the trial court is in a superior position to observe witnesses demeanor and evaluate their credibility. See *People v. Watson*, 315 Ill. App. 3d 866, 876 (2000). Accordingly, the trial court's determination of defendant's credibility was not limited to examining her testimony for inconsistencies. We have carefully reviewed the complete record of the suppression hearing to place the State's use of defendant's notes in context. We determine that in light of the trial court's superior opportunity to observe defendant, and the extensive testimony presented

by the parties, the impeachment of defendant's credibility created by the use of these notes was unlikely, by itself, to significantly affect the trial court's overall credibility determination. We further note, that this determination is supported by the trial court's rejection of this argument in defendant's posttrial motion. Therefore, we conclude that the allegedly improper disclosure of the notes did not affect the outcome of the suppression hearing.

Similarly, we determine that although the State's use of the notes affected defendant's credibility at trial, it did not affect the outcome. The State made far less use of defendant's notes to impeach her at trial than at the suppression hearing. The State's case against defendant was based primarily on circumstantial evidence, the medical testimony. In light of the overwhelming medical evidence establishing the time of the victim's injuries, we find that the limited impeachment of defendant's testimony regarding the circumstances surrounding her equivocal admission to the police was insufficient to impact the outcome of the trial. Therefore, we conclude that defendant has not established ineffective assistance of counsel either as a result of Elovitz's disclosure of the notes or Montemurro's subsequent failure to object to their use.

Defendant argues that she was denied the effective assistance of counsel because Elovitz, Montemurro, and Butera all failed to advise her of pretrial plea negotiations and resulting plea offers. The right to effective assistance of counsel extends to the decision to accept or reject a plea offer. *People v. Curry*, 178 Ill. 2d 509, 518 (1997). Accordingly, an attorney's failure to communicate a plea offer to her or his client may give rise to a claim of ineffective assistance of counsel even if the client subsequently

receives a fair trial. *Curry*, 178 Ill. 2d at 517. Defendant cites several portions of the record that suggest that defense counsel discussed the possibility of a plea agreement before trial. In her posttrial affidavit, defendant avers that she was never adequately informed of the substance of these negotiations. However, we find that the oblique references to plea negotiations contained in the record provide an insufficient basis against which to judge either the performance or prejudice prong of the *Strickland* analysis. We cannot conclude from the record before us that *any* plea offer was ever extended by the State. Without evidence of the content of those conversations, we cannot determine whether they constituted plea offers sufficiently definite to implicate defendant's right to accept or reject. Similarly, we cannot determine that defendant was prejudiced by the failure to communicate a plea offer without knowing whether the terms of such an offer were favorable compared to the sentence she ultimately received. Therefore, we conclude that defendant cannot establish the ineffective assistance of counsel as a result of the alleged failure to communicate plea offers.

Defendant argues that counsel committed various errors related to the motion to suppress her statement to the police. Some of the errors defendant alleges could not have resulted in prejudice. For example, defendant argues that defense counsel filed a legally insufficient motion to suppress. However, no prejudice resulted because the trial court conducted a full hearing on the motion despite the alleged inadequacies of the motion. Similarly, defendant argues defense counsel failed to call all of the police officers or prosecutors that witnessed the statement. However, no prejudice could have resulted because the State bore the burden of proof (see *People v. Chapman*, 194

Ill.2d 186, 208-09 (2001)) and called each of these witnesses during its case in chief.

The primary thrust of defendant's arguments is that defense counsel failed to properly present and argue the motion. To prevail on her claim on this basis defendant must show that there was a reasonable probability that the motion would have been granted absent the alleged errors and that the outcome of the trial would have been different absent the alleged errors. *In re D.B.*, 303 Ill. App. 3d 412, 418 (1999). Although we will not list them individually, we have considered each of defendant's remaining allegations of error. We determined above that the trial court's finding that defendant's statement was voluntary was not manifestly erroneous. We further determine that even if we disregard the allegedly objectionable evidence and consider the remaining evidence in light of the arguments defendant presents on appeal, the trial court's determination of voluntariness would not have been manifestly erroneous. Therefore, defendant cannot establish that absent the alleged errors the outcome of the suppression hearing would have been different, and we conclude she was not denied the effective assistance of counsel during the suppression hearing.

Defendant also argues that she was denied the effective assistance of counsel because defense counsel was not aware of the number of peremptory challenges to which she was entitled. Generally, the exercise of peremptory challenges is a matter of trial strategy entitled to deference under the *Strickland* standard. *People v. Wilson*, 303 Ill. App. 3d 1035, 1045 (1999). However, we agree with defendant that she has demonstrated that defense counsel's performance in this area was deficient and not a matter of trial strategy. Defense counsel should have been

able to easily discover the number of peremptory challenges available by consulting Supreme Court Rule 434(d) (134 Ill. 2d R. 434(d)). Nor is there any reason why defense counsel could not employ the simple expedient of inquiring of the trial court regarding the number of peremptory challenges available before jury selection began. We further determine that although his trial strategy might have remained unchanged, it is reasonably likely that defense counsel would have exercised the available challenges differently, had he been aware of the total number of challenges allowed.

However, we determine that defendant has not established the prejudice prong of the *Strickland* analysis. When an ineffective assistance of counsel claim involves the use of peremptory challenges, the defendant must identify a clear bias or prejudice held by the juror allegedly improperly accepted sufficient to demonstrate that had that juror not served the verdict would have been different. *Wilson*, 303 Ill. App. 3d at 1045. Under the circumstances of this case, defendant must identify a juror, or jurors, seated after defense counsel expended all available peremptory challenges that harbored a bias or prejudice against defendant sufficient that the outcome of the trial would have been different had that juror not been seated. Defendant must further demonstrate that this bias or prejudice was both (1) greater than that held by another juror previously challenged, and (2) insufficient to justify challenging the juror for cause.

On appeal, defendant has failed to make this showing. Defendant identifies two jurors as "unfavorable" and two others that defense counsel would not otherwise have excused. However, defendant identifies no specific *voir dire* response indicating bias or prejudice on the part of the

unfavorable jurors. Defendant also fails to provide any argument supporting her contention that the excluded jurors were more acceptable. Absent a specific and detailed discussion of the relative merits of these jurors, we cannot evaluate the prejudice, or lack thereof, resulting from the deficiencies in defense counsel's performance. Therefore, we conclude that defendant has failed to establish prejudice resulted from defense counsel's deficiencies.

Finally, defendant directs numerous allegations of error at defense counsel related to the trial itself. We note initially, that many of the allegations of error defendant raises are decisions generally considered to be part of trial strategy and largely immune from the *Strickland* analysis. See *People v. Vida*, 323 Ill. App. 3d 554, 564 (2001), citing *People v. Richardson*, 189 Ill. 2d 401, 414 (2000). For example, although defendant identifies numerous occasions when defense counsel failed to object, the decision whether to object to testimony is usually a matter of trial strategy. See *People v. Fender*, No. 5-00-0227 (September 27, 2001). Similarly, defendant identifies several decisions regarding which witnesses to call. These decisions are also matters of trial strategy ordinarily immune to the *Strickland* analysis. See *Vida*, 323 Ill. App.3d. at 564.

Other allegations of error simply employ hindsight to question defense counsel's performance, without considering the circumstances as known to defense counsel at that time. For example, defendant alleges that defense counsel ineffectively selected Leestma as an expert witness because he was impeached with his prior writings and his opinion was inconsistent with the facts developed at trial. However, defendant fails to identify the expert witness, if one exists, who was available to testify on her behalf and would have provided more favorable testimony. Nor does

defendant identify anything in the record to suggest that defense counsel knew of such a witness and failed to call her or him. We believe that this argument is little more than an attempt to construe the evidentiary weakness of defendant's case as the ineffectiveness of defense counsel.

We find that the weaknesses we have identified above are common to many of the remaining allegations of error in defendant's ineffective assistance argument. However, there is no need to inquire further into the individual allegations of error, because we may proceed directly to the second prong of the *Strickland* analysis. See *Edgeston*, 243 Ill. App. 3d at 12. Therefore, the question before us is whether, in light of the evidence presented, the outcome of defendant's trial would have been different absent the alleged errors.

The State presented overwhelming evidence of defendant's guilt. As we observed above, the State presented one medical expert after another who testified that the victim's injuries were the result of shaken baby syndrome and could not have resulted from dancing, tumbling, or other accidental causes, except an automobile accident or a fall from a height of two or more stories. The experts also substantially agreed that the injuries occurred on August 11, 1994, during the time period while the victim was in defendant's care. Other witnesses testified regarding the victim's condition, narrowing the possible time frame for the victim's injuries to a small period on the afternoon of August 11. The only medical expert who testified that the victim's injuries could have occurred outside this time frame, was thoroughly impeached with prior inconsistent statements that supported the State's theory of the case. Furthermore, the only evidence of a prior injury to the victim's head was a small bruise, and defendant testified

that she saw the injury occur and did not believe the bruise required medical attention. We recognize that the medical evidence did not unequivocally exclude the possibility that Cynthia C. shook the victim shortly after she picked him up from defendant's home, and defense counsel attempted to impeach Cynthia C.'s credibility. However, we find that her testimony was consistent with the medical evidence and supports the conclusion that the victim was injured before he left defendant's home. We do not find that absent the errors defendant identifies, that a substantial probability exists that the jury would have evaluate[d] the expert medical testimony or Cynthia C.'s credibility differently. Therefore, we determine that, in light of the evidence presented, defendant cannot establish the second prong of the *Strickland* analysis – she cannot demonstrate that the alleged errors, either individually or collectively, were sufficient to affect the jury's verdict. See *Edgeston*, 243 Ill. App. 3d at 12. We conclude that defendant was not denied the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed,

HUTCHINSON, P.J., with BOWMAN and GROMETER, JJ., concurring.

APPENDIX B

93563

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 30, 2002

Mr. Aldo E. Botti
Botti, Marinaccio & De Longis, Ltd.
720 Enterprise Drive
Oak Brook, IL 60523

No. 93563 – People State of Illinois, respondent, v. Pamela Jacobazzi, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 21, 2002.

APPENDIX C

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL
CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. PAMELA JACOBAZZI, Defendant.	No. 95 CF 1160 VOLUME 20 OF 20 (Filed Jun. 29, 2000)

REPORT OF PROCEEDINGS taken at the trial of the above-entitled cause, before the Honorable RONALD B. MEHLING, Judge of said Court, and a jury, Room 4012, on Tuesday, the 18th day of May A.D., 1999, at the hour of 1:30 p.m.

PRESENT:

MR. JOSEPH E. BIRKETT, State's Attorney of DePage County, by
MS. JANE E. RADOSTITS and
MS. KAREN M. MASTERS,
Assistant State's Attorneys,

appeared on behalf of The People of the State of Illinois;

MR. ANTHONY M. MONTEMURRO and
MR. RICHARD M. BUTERA,

appeared on behalf of the Defendant.

DEFENDANT PAMELA JACOBAZZI.

Lic. No. 084-003440

* * *

[65] deciding the weight to be given to the testimony you heard from the witness in the courtroom.

It is for you to determine what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made.

Evidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness.

The defendant has introduced evidence of his reputation for truth, veracity, morality, honesty, integrity and being a peaceful and law-abiding citizen. This evidence may be sufficient when considered with the other evidence in the case to raise a reasonable doubt as to the defendant's guilt.

However, if from all the evidence in the case you are satisfied beyond a reasonable doubt of the defendant's guilt, then it is your duty to find her guilty even though he or she may have a good reputation for truth, veracity, morality, honesty and integrity.

A person acts knowingly with regard to the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such a [66] nature or

that such circumstances exist. Knowledge of a material fact includes awareness of a substantial probability that such fact exists.

A person acts knowingly with regard to the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct.

A person commits the offense of first degree murder when she kills an individual in performing the acts which caused the death, she knows that such acts create a strong probability of death or great bodily harm to that individual.

To sustain the charge of first degree murder, the State must prove the following propositions:

First proposition, that the defendant performed the acts which caused the death of Matthew Czapski; and,

Second proposition, that when the defendant did so, she knew that her acts created a strong probability of death or great bodily harm to Matthew Czapski.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find [67] the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

In order for you to find that the acts of the defendant caused the death of Matthew Czapski, the State must prove beyond a reasonable doubt that the defendant's acts

were a contributing cause of the death and that the death did not result from a cause unconnected with the defendant.

However, it is not necessary that you find the acts of the defendant were the sole and immediate cause of death.

When you retire to the jury room, you will first select one of your members as the foreperson. He or she will preside during your deliberations on your verdict. Your agreement on the verdict must be unanimous. Your verdict must be in writing and signed by all of you, including the foreperson.

The defendant is charged with the offense of first degree murder. You will receive two forms of verdict. You will be provided with both a not guilty and guilty form of verdict.

[68] From these two verdict forms you should select the one verdict form that reflects your verdict and sign it as I have stated. Do not write on the other verdict form. Sign only one verdict form.

So after you've deliberated and hopefully have been able to arrive at a unanimous verdict, you select the verdict that is your decision, and let's review the two verdicts forms.

If your decision is as follows: We, the jury, find the defendant, Pamela Jacobazzi, not guilty of first degree murder, foreperson would sign on top and the other 11 jurors below.

Conversely: We, the jury, find the defendant, Pamela Jacobazzi, guilty of first degree murder, if that is your

decision, foreperson would sign on top and the other 11 below.

All right. At this time then we're going to have the bailiff sworn and he will attend to you during your deliberations. We will get these jury instructions back to you together with the verdicts for your review. There are certain exhibits and other materials that have been admitted. Most of those will be coming back to you. There are several things that will not. But we're going to assemble those, so it may

* * *

APPENDIX D

[1] STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL
CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. PAMELA JACOBAZZI, Defendant.	No. 95 CF 1160 VOLUME 18 OF 20 (Filed Jun. 29, 2000)

REPORT OF PROCEEDINGS taken at the trial of the above-entitled cause, before the Honorable RONALD B. MEHLING, Judge of said Court, and a jury, Room 4012, on Friday, the 14th day of May A.D., 1999, at the hour of 1:30 p.m.

PRESENT:

MR. JOSEPH E. BIRKETT, State's Attorney of DuPage County, by

MS. JANE E. RADOSTITS and
MS. KAREN M. MASTERS,

Assistant State's Attorneys,

appeared on behalf of The People of the State of Illinois;

MR. ANTHONY M. MONTEMURRO and

MR. RICHARD M. BUTERA,

appeared on behalf of the Defendant.

DEFENDANT PAMELA JACOBAZZI.

Lic. No. 084-003440

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[75] you gave them. I have People's No. 1, 1A, and then it's 2 through whatever. I wind up with 20 total instructions with 1 and 1A for the State. Defense has 1 through – these are including the verdict forms – 24.

There are – a few instructions are a little different. Most of them are just – such as right of an attorney to interview a witness, whether a statement or statements were made, things of that nature. I believe one set gives instruction for knowledge and the other group of instructions give a definition for knowledge and intent, things of that nature, which I think will be fairly straightforward.

The area that I think there will be some controversy with really is one, and that deals with a lesser included offense of involuntary manslaughter. So the defense – the

State has guilty or not guilty of straight up first degree murder.

Defense is propounding, along with the proposition instruction, a lesser included involuntary murder.

Now, I suppose I should ask the lawyers what the law is, but we'll skip over that. I'll just tell you what I think the law is. Then if you think it's [76] different, you can advise me.

MR. BUTERA: All right.

THE COURT: My understanding is that there has to be slight evidence in order to give a lesser included instruction. So it's slight. That doesn't mean it has to be a whole lot. It's certainly not beyond a reasonable doubt, it's not more probably true than not true. It's much less than that. So it's not a big standard or a high standard that has to be met.

The problem I have is – and I'll let you think about it until Tuesday. You can bring in some case law. I didn't really know how we would handle this until really the entire case was put in, particularly the testimony by all witnesses.

But based upon what I've heard here so far, you have the State's theory, which I'm not going to go into again but I think we understand where they're coming from, and Ms. Jacobazzi, who simply says that she did nothing to cause these injuries in any manner, shape or form.

And at best what you may have, if you believe Detective Leonas – now, this is only if you believe Detective Leonas because it's a credibility issue, because she denies

it – that she did some tumbling or [77] dancing or somersaulting with the baby.

But she took the stand today and said no, that absolutely did not occur, that if anything like that came up, it was brought up by the police. It's not something – I denied that I did any, quote, somersaulting.

I think she did say that at one point she did hold the child and very slowly waltzed, you might say, or danced in the room, but certainly nothing that would induce any type of trauma whatsoever. So that's where I'm at.

MR. MONTEMURRO: Okay.

THE COURT: So you take a look at it. If you have any case law, bring it in. It seems to me that it's not like she's admitting, well, this happened or I might have accidentally dropped the child when I was carrying the child one way or the other.

I had a case several years ago, I might have bumped into the wall, that type of thing. Her testimony was that she took care of the child in a good and well manner and nothing really ever occurred except that incident on Monday, and everybody seems to agree that that was a minor bump on the forehead at least at that point.

[78] MR. MONTEMURRO: I would just direct your Honor to some of the evidence that was admitted into evidence that's going back to the jury, most specifically the complaints.

THE COURT: I'm not going to make my mind up today. I'm just telling you what I think.

MR. MONTEMURRO: Yes, sir.

MS. RADOSTITS: Are we going to wait until Tuesday to – I might prepare an argument that's based on what I think you're going to rule now and then find out Tuesday morning that my argument has to be tailored, if it does. You know what I mean?

THE COURT: Well, I'd prefer to think about it. Can't you prepare an alternative –

MS. RADOSTITS: Oh, no. I agree. I don't have any problem with you thinking about it.

I'm just a little worried about waiting until Tuesday morning and then saying are you ready and changing the game plan on us. You know what I mean?

THE COURT: Well, I'm not going to make a final decision today, but I'm going to tell you that I'm about – it's more true than not true in my own mind at this point that I would not be giving a lesser included offense.

* * *

[1] STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL
CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. PAMELA JACOBAZZI, Defendant.	No. 95 CF 1160 VOLUME 19 OF 20 (Filed Jun. 29, 2000)

REPORT OF PROCEEDINGS taken at the trial of the above-entitled cause, before the Honorable RONALD B. MEHLING, Judge of said Court, and a jury, Room 4012, on Tuesday, the 18th day of May A.D., 1999, at the hour of 9:30 a.m.

PRESENT:

MR. JOSEPH E. BIRKETT, State's Attorney of DePage County, by
MS. JANE E. RADOSTITS and
MS. KAREN M. MASTERS,
Assistant State's Attorneys,

appeared on behalf of The People of the State of Illinois;

MR. ANTHONY M. MONTEMURRO and
MR. RICHARD M. BUTERA,

appeared on behalf of the Defendant.

DEFENDANT PAMELA JACOBAZZI.

Lic. No. 084-003440

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* * *

[11] All right. Now we'll go through the defense instructions.

MR. BUTERA: I'm sorry. If I may just mark –

THE COURT: Okay. We have Defense Instructions Nos. 1 and 2, which is IPI 1.01. I take it those are going to be withdrawn?

MR. MONTEMURRO: They've already been given, Judge.

THE COURT: We have Defense No. 3, opening statements. I believe that's already been given, has it not?

MR. MONTEMURRO: Yes, sir.

MR. BUTERA: Yes, sir.

MR. MONTEMURRO: That's withdrawn.

THE COURT: So that's withdrawn. Defense No. 4, note taking, we've given that already.

MR. BUTERA: We have given that already, so that would be withdrawn.

THE COURT: No. 5, lesser included one. What's your position on that?

MR. MONTEMURRO: Most respectfully, Judge, if I may just make a brief argument. We've researched the law in the case and, unfortunately, I couldn't get a printout on the most recent case that I could find, People vs. Rakow, R-a-k-o-w, which we went through the [12] Internet and all. It may be a Rule 23 out of the first district. We don't know.

For general proposition, citing People vs. Davis, is a murder conviction was reversed where involuntary manslaughter instruction was denied and there was evidence to support the defendant's theory of recklessness. And most respectfully, with Rakow, reasonable jury could have believed that the defendant did not intend to murder infant by placing him face down on pillow but could have believed that such action was gross deviation from the reasonable standard of care.

In researching the case law in this particular area, most of those cases that do not allow the instructions are those that are very straightforward with regard to stabbings, shootings where the self-defense or arguments were not interposed in the case but were just asked for because they could or could have been part of the proofs in the cause.

In this particular case and in the case law the defendant is entitled – I'm citing People vs. Burnett, a 1981 case

– the defendant is entitled to a manslaughter instruction if the record establishes basis for them irrespective of the source of the [13] prospective evidence.

In this particular case, whether you believe or disbelieve the defendant when she testified, whether the jury does that or does not, they still have evidence before them of perhaps recklessness in this particular cause. One, you have a filing by the prosecutrix in this cause of a civil complaint in which she alleges through her attorney recklessness, negligence, gross negligence. That is before the jury. You've allowed that evidence to go forward.

There is also evidence in this particular case that, whether the defendant is believed or not, she has denied the fact that she danced or had tumbling exercises or the like, but that evidence has been put in by the State and is the statement she had given prior.

I cite you to the case of People vs. B-o-i-s-v-e-r-t, a 1979 case. If there is some evidence in the record which, if believed by the jury, would reduce the crime to involuntary manslaughter, the defendant has a right to an instruction defining the lesser included offense, even if the evidence is conflicting and even if the defendant's testimony is impeached.

[14] THE COURT: But in this case what you're asking for is impeachment testimony to be brought in as substantive testimony by the police officer, so I don't see where that case can – that case certainly can be construed –

MR. MONTEMURRO: Well, I think that there's enough evidence outside of the officer's testimony. You have the testimony of the victim's mother who testified to

various and sundry comments that were made that she testified to that the defendant had made to her regarding how the child originally fell.

THE COURT: Exactly what? Refresh my recollection. What did she –

MR. MONTEMURRO: They've attempted to impeach my client on how the child originally fell, whether it was from a standing position next to a chair or whether it was sitting on a kitchen floor in which the child fell forward and hit his head.

MS. MASTERS: That's regarding 8/8. That's regarding a different date, Judge.

MR. MONTEMURRO: It may be regarding 8/8, but there's enough evidence in there which would indicate that – strike that.

She also testified that – the mother [15] testified that she had a conversation with my client regarding this tumbling and regarding this telling her not to have the child tumble or not to have the child in any way engaged in activities which would be of that nature.

THE COURT: Right.

MR. MONTEMURRO: Even though my client has denied that, that in fact she did that, that evidence is before the jury and they certainly have a right to consider that based on the case law.

THE COURT: Well, as I recall that testimony, it was that the mother – it was brought up by your client, and the mother said no, I do not want that type of activity participated in by my child, and that was the end of it.

MR. MONTEMURRO: I think there was subsequent testimony, according to my notes, that the mother said that there was a conversation regarding that.

THE COURT: Well, that may be. I'd have to stand on the record. All right. Anything else then?

MR. MONTEMURRO: Other than that, no.

THE COURT: State?

MS. MASTERS: Judge, just briefly. The situation in People vs. Rakow is a situation where the defendant [16] actually acknowledged doing something to the child, actually putting the child face down on the couch.

Here we have a situation where the defendant has completely denied any type of activity with regard to Matthew Czapski. What happened on the 8th of August of 1994 has nothing to do with what happened on the 11th of August.

The defendant completely denies doing anything on that date, and there was no evidence whatsoever in this case the defendant committed the offense of involuntary manslaughter. We'd ask that that instruction be denied.

THE COURT: Okay. Well, I'll show it will be refused.

Then we have Defendant's No. 6, indictment. I think that's already been given.

MR. BUTERA: I believe so. We withdraw that.

THE COURT: We have No. 7 then, defendant is presumed innocent. I believe that's already been given.

MR. BUTERA: Yes.

THE COURT: No. 8, circumstantial evidence. I believe we have that already.

MR. BUTERA: We'll withdraw that.

* * *

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE
COUNTY FOR THE EIGHTEENTH
JUDICIAL CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs. No. 95 CF 1160
PAMELA JACOBAZZI,
Defendant.

JURY INSTRUCTIONS

A person commits the offense of involuntary manslaughter when he unintentionally causes the death of an individual by acts which are performed recklessly and are likely to cause death or great bodily harm to another.

To sustain the charge of involuntary manslaughter, the State must prove the following propositions:

First Proposition: That the defendant performed the acts which caused the death of Matthew Czapski; and

Second Proposition: That the defendant performed those acts recklessly; and

Third Proposition: That those acts were likely to cause death or great bodily harm.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

When you retire to the jury room you first will elect one of your members as your foreperson. He or she will preside during your deliberations on your verdict.

Your agreement on a verdict must be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson.

The defendant is charged with the offense of First Degree Murder. Under the law, a person charged with First Degree Murder may be found (1) not guilty; or (2) guilty of First Degree Murder; or (3) guilty of Involuntary Manslaughter.

Accordingly, you will be provided with three verdict forms: "not guilty", "guilty of First Degree Murder", and "guilty of Involuntary Manslaughter".

From these three verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. Do not write on the other two verdict forms. Sign only one of these verdict forms.

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

The defendant is charged with the offense of First Degree Murder. The defendant has pleaded not guilty. Under the law, a person charged with First Degree Murder may be fond (1) not guilty; or (2) guilty of First Degree Murder; or (3) guilty of Involuntary Manslaughter.

We, the jury, find the Defendant, Pamela Jacobazzi, guilty of Involuntary Manslaughter.

_____

Foreperson

_____

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APPENDIX E

[1] STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY FOR THE EIGHTEENTH JUDICIAL CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 95 CF 1160
vs.	)	VOLUME 19 of 20
PAMELA JACOBAZZI,	)	(Filed June 29, 2000)
Defendant.	)	

REPORT OF PROCEEDINGS taken at the trial of the above-entitled cause, before the Honorable RONALD B. MEHLING, Judge of said Court, and a jury, Room 4012, on Tuesday, the 18th day of May A.D., 1999, at the hour of 9:30 a.m.

PRESENT:

MR. JOSEPH E. BIRKETT, State's Attorney
of DuPage County, by
MS. JANE E. RADOSTITS and
MS. KAREN M. MASTERS,
Assistant State's Attorneys,

appeared on behalf of The People of the State of Illinois;

MR. ANTHONY M. MONTEMURRO and
MR. RICHARD M. BUTERA,

appeared on behalf of the Defendant.

DEFENDANT PAMELA JACOBAZZI.

Lic. No. 084-003440

* * *

[34] He told you that he had no doubt that Matthew had been shaken on August 11th, 1994, and that this was a very, very severe case of shaken baby syndrome.

He told you with regard to the symptoms, that Matthew would have been immediately symptomatic, but in his opinion, due to the massive nature of these injuries, Matthew would have been immediately unconscious. He wouldn't have been alert at all in any way, shape or form after the defendant shook him.

You also heard from Dr. Soter. Dr. Soter is a pediatric trauma and burn specialist. She works at Cook County Children's Hospital, and she also sees very, very seriously injured children on a daily basis.

She told you that she was originally contacted in this case by the defense and rendered an opinion for them. She testified here in court as to her opinion and she testified for the State. She told you that this was a very, very severe case of shaken baby syndrome, that the defendant shook Matthew while he was in her care on August 11th, 1994, and that the force that was used was tremendous in order to cause these injuries.

You also heard from Dr. Alexander. Dr. Alexander is also an expert in child abuse. He's a [35] pediatrician and he teaches, he publishes peer review literature on child abuse, on shaken baby syndrome, but he also sees live patients in his clinic and he sees child abuse victims in his clinic.

He told you that Matthew suffered a severe injury to his left hemisphere of his brain, that there was massive swelling and there was massive bleeding in the subdural

and subarachnoid spaces. He told you about the retinal hemorrhages that he saw. He said that the combination of these injuries indicated to him that this was, again, a severe case of shaken baby syndrome.

He said that relative to his symptoms, quote, they would have been immediate, overwhelming symptoms of an altered consciousness. Matthew couldn't eat and he would have developed breathing difficulties and couldn't do anything purposefully after a shaking of this nature.

With regard to the time frames, you've got to consider two things. No. 1, the extent of the injury. Matthew could only have gone about one to two hours without any type of medical intervention before he would have died.

Also, with regard to the symptoms, you look to [36] when the child was last normal, if he was playful, if he was eating, he was not anywhere near a near-fatal injury at that point. He told you that the injuries had to have occurred in the mid to late afternoon, and they had to have occurred one to two hours prior to Matthew being taken to St. Joe's Hospital because his injuries were so severe and the swelling was so significant. It took time for that to occur.

Every treating doctor and every expert in this case agrees. Matthew Czapski was violently shaken while he was in the defendant's custody. They're just as sure as they would be if they had been in the living room when it happened.

Now, the defendant says that Matthew died as a result of an old injury and new blood. Matthew isn't dead because of some preexisting condition that happened to manifest itself on August 11th, 1994.

In order to believe that, you have to believe that little falls kill little kids or that innocent falls kill little kids, and that just doesn't happen. There's no scientific testimony that that occurs. You also have to believe that some mystery impact on some mystery date just happened to manifest itself on August 11th, 1994, and happened to cause

* * *

[40] his opinion was. Dr. Leestma is the ultimate Monday morning quarterback. He doesn't even belong on the same playing field with any of these other doctors.

In order to believe the defense theory in this case, you have to ignore absolutely every other shred of evidence in this case, including what the defendant said to Detective Joe Leonas and what she said here in court in her testimony from that witness stand.

Her statements are another thing to consider when you consider that first proposition, the defendant performed the acts that caused the death of Matthew Czapski, and her statements show her consciousness of guilt. The defendant makes so many inconsistent statements in her statements, both to the police and her statements here in court, that it's hard to keep track of them.

With regard to what happened on August 8th, 1994, her first conversation with Joe Leonas she says, "I was walking with Matthew, and as I was walking with him, he fell down, and as he fell down, he bumped his head down in front of him in between his legs."

Then in her second conversation with Detective Leonas she says, "I was teaching him how to sit and while I was teaching him how to sit, he just fell [41] forward and

bumped his head on the ground in front of him while in the kitchen."

In her testimony here to you from that witness stand, the defendant says about the bump on August 8th, 1994, that she was walking with him in the kitchen to get him a bottle, and when she walked him into the kitchen to get a bottle, she put him down on his rear end and he fell forward.

But the other thing she tells you in her testimony is that he can't sit, and the reason why he can't sit is because he keeps falling backwards. But in all of the reasoning for what happened on August 8th and all of her various statements, she's telling you that Matthew was falling forward. It's completely inconsistent and it just doesn't make sense.

With regard to the symptoms, she says a couple of things about those. In her first conversation with Detective Leonas she says Matthew is fine. In her second conversation with Detective Leonas she says Matthew is fine during the week and on August 11th, 1994.

Then in her direct examination, her testimony here under very pointed questions from Mr. Montemurro, she manages to get out that she was – that Matthew was [42] sick, that he had a runny nose, that he had been drooling. In her opinion he was very, very ill and that she couldn't believe that Matthew's mother Cindy didn't take the baby to the hospital.

But then on cross-examination she again says that Matthew was fine, he had not been sick. And the only thing I can say about all her various stories about these things is only a liar can't keep her story straight, and

that's exactly what she's doing with regard to the symptoms that she saw and what happened on August 8th, 1994.

Again, inconsistent statements about what happened on August 11th, 1994. In her first conversation with Detective Leonas, she says nothing happened, he was perfectly fine, he was chipper, he was having a great day and he was playing, he was doing somersaults.

In her second conversation, though, she breaks down a little bit and she's like, well, maybe the injuries could have occurred when he was doing somersaults because we were tumbling or maybe it happened when I was dancing with him because I was dancing with him. And then she says, "What happens to me if I tell you I did this?"

* * *

[49] a certainty. The doctors tell you that there had to have been a significant, tremendous, excessive, violent force to cause these injuries and that the brain injury was consistent with a child falling from a second to a fifth story window. That's how severe the force is.

They told you that the massiveness of this injury is indicative of the energy that was necessary in the force. They also told you that this was no accident. It didn't happen as a result of an innocent fall, it didn't happen as a result of a somersault or dancing. It was intentional. It was a vicious shaking that caused devastating injuries. The force in this case makes knowledge an absolute certainty.

The last thing to look at in terms of whether the defendant knew what her acts did and that her acts caused great bodily harm or death is what she did after

she shook that baby. She didn't call 9-1-1 when she saw that he was drastically ill and unconscious. What she does is she puts a drastically ill, critically ill dying baby in a crib.

A little while ago I talked about expectations, and we all have them. As jurors, you have expectations with regard to a verdict in this case. And the term verdict comes from a Latin word [50] which means to speak the truth, and as prosecutors, Jane and I have expectations that your verdict in this case will speak the truth, that Pamela Jacobazzi is responsible for viciously, violently shaking Matthew Czapski, that she's responsible for the 16 months that that little boy tried to make it and she's responsible for his death, and we ask you to find her guilty of first degree murder.

THE COURT: Okay. Thank you, Ms. Masters. Mr. Butera?

MR. BUTERA: Thank you, your Honor. If I may just have a moment to get myself set up.

CLOSING ARGUMENT
BY MR. BUTERA:

May it please the Court, prosecution, ladies and gentlemen of the jury:

Before I begin, it's always difficult when you're thinking about how you're going to start out and what you're going to say to you, a jury, in the presentation of a case. I've had a long time to think about it. You've thought about it, we've thought about it, and at some point you think, well, how am I going to start this? What am I going to do? What am I going to say?

[51] And sometimes, sometimes those thoughts are not clear as to what you exactly want to say when you're sitting there and you hear what the prosecutor has to say. Pretty strong words, liar, fabricator, ignoring things, Dr. Leestma shouldn't even be on the same playing field as these other doctors. Pretty strong criticisms.

And in sitting there and listening to this, all of a sudden it's clear, it's clear in the presentation of this case, and it's clear because there's one thing. This is it (indicating), Defendant's Exhibit No. 8.

And what do you need to remember and what do you need to think about? This is the CT scan from St. Joseph's Hospital that was looked at by Dr. Sullivan, a front-line trauma radiologist, the first look at this child, the first time that anyone can see what is going on in this child's head, this child's brain in terms of the injury, Dr. Sullivan, the first man there.

And what does he tell you? What does he tell all the other doctors? What does he say in his report? Subdural hematoma, a lighter area, the darker shading, old blood. Front-line – in their words – trauma [52] doctor to make an evaluation about Matthew Czapski when he is brought to the emergency room by his mother.

And there's significance with this, and the significance has to do with everything that Dr. Sullivan testified to and we presented by way of testimony to you as a jury. Dr. Sullivan has no axe to grind. Dr. Sullivan is making a determination as to this child, what he sees in the CT scan so the other doctors, whether it be in the emergency room, whether it be at Lutheran General Hospital, whether it be the critical care doctors, so they have the necessary information to adequately, appropriately and,

most importantly, to be able to save that child's life and make that attempt.

When the prosecutors have the burden to prove all of their elements against Pam beyond a reasonable doubt, to tell you that evidence was ignored, they are absolutely correct. But that ignoring took place in relationship to Dr. Sullivan because nobody talked to Dr. Sullivan. Nobody cared about Dr. Sullivan. Nobody saw him before, after, during, in any way whatsoever, whether it be from Lutheran General, whether it be the police, whether it be the Department of Children and Family Services, whether it be the prosecutors, whether

* * *

[85] not been done, and he has told you in his opinion that there is an old bleeding of that brain, an old injury to that child by way of some type of trauma because we know that is only how it occurs, by a trauma, and that there could be a leaking of that bleeding in this child's brain and that anything, during the course of the time that Pam had that child, could have been done to set that off, anything. He's seen it where there has been absolutely nothing. He pointed the case articles out to you, and he has seen where there has been something.

And it doesn't have to be something significant, and it doesn't have to be something major, and it could have been that fall forward on the floor.

But also keep in mind when the prosecutors keep telling you nothing wrong, baby was normal, there were signs that something wasn't right because Pam testified and Pam told you the mother said the child can sit up, can

walk on furniture, that he can interact, that he can play, that he can do a lot of different things, what a normal one-year-old would do. And what did Pam see? She didn't see someone, as the police said, underdeveloped, undernourished, a problem. That's not what she said. What she said is

* * *

[Rebuttal Argument by Ms. Jane E. Radostists]

[48] and the white, and Dr. Bauer drew you a diagram that had a test tube. He cut it in half and there was a black part and a white part. He said it's not old blood, new blood. What it is, is layering of blood, and it's from the head laying down for so long that the blood has layered.

So the guy in the head says it's not old blood; it's layering, just what Dr. Smith said was one of the three possibilities. But more important is the fact that Dr. Smith said even if there was a little bit of old blood up there and, you know, frankly, it doesn't really make a difference, but if there was some old blood up there, doesn't have anything to do with anything. You know what that means? It's another red herring that they're throwing out there so that you'll think about anything except for the evidence that shows her guilt.

They talk about Dr. Choi and Dr. Choi not having a toxicology report. People's Exhibit No. 20 is a certified copy of the postmortem examination. It's the same exhibit that's been in the courtroom the entire time. Every exhibit that we've had we have marked and walked over to this table, we have said for the record let them examine it, they flipped through

* * *

[51] swelling was too big.

I think Mr. Montemurro just suggested to you that maybe Cindy shook a sleeping baby before she put him in the car, which is absolutely ridiculous. It's counter to all of the medical testimony and completely says that Leestma is out, that it happened ten days earlier. I think that's what he just suggested to you. I guess that's another red herring that they've thrown out at you at the last minute.

The ophthalmologist, she said I've seen a number of shaken baby cases before, and it takes a lot for me to say I'm absolutely positive. As a matter of fact, I'll say consistent with on many occasions I'm absolutely positive this is the one and the only because that blood was so fresh in those folds and it was so severe that it blinded that child. Immediate? Absolutely.

All of the medical evidence is consistent. No matter what kind of charts they throw at you, the charts aren't evidence. What they've done is mix a bunch of things up. They talked about cause of death. Choi didn't say blunt trauma. He said trauma. It says it right in the report. And it's says trauma consistent with shaken baby. That's what he testified

* * *

[55] You could tell by the way she talked about her day. At 10:00 o'clock we do this, then we go for a walk, then everybody goes down for naps, and then we have lunch and then we go to the park and then we come back, and everything happens at a certain time at a certain day, and you know what, Matthew wasn't that kind of kid. He was the round peg in a square hole or however it goes. He didn't fit into her schedule. He was a little bit different.

Do you remember what she said about August 11th after the walk? The other two kids took a nap. Not Matthew, though. He stayed up she said. It was her down-time and he stayed up, that drooling, crabby kid, the one that cried at Pat Lang's house all the time.

How about some of the other things that she said. Well, okay, so if he could eat yogurt before he saw me but he couldn't eat jarred food, like there's a difference between the plastic container and a glass container. He somehow forgot how to swallow in a month when he went to see her. Or he couldn't sit up. I had to teach him to sit up.

I invite you to look at that video and see if he is propped up in any way. He's not. And that was a [56] month before he ever met her. He could sit up. There was nothing wrong with him, nothing at all. And if he couldn't sit up and somehow she was going to teach him to sit up, do you think a ceramic tile floor is the place to do it?

You know, it's obvious from some of the testimony of other people she really didn't like watching Matthew, it wasn't working out. How about this guy Peter that she lives with? He takes the stand and says the kid is funny looking, he's got a big head, there was something wrong with the kid. And then he goes on to say, well, I really only saw him once and that was that July date and he was sleeping.

So where do you think Peter is getting all this funny looking stuff from? It's from her (indicating). He's lived with her for ten years.

MR. MONTEMURRO: Judge, I'm going to object. That's not a reasonable inference.

MS. RADOSTITS: That's absolutely a reasonable inference to draw, Judge.

THE COURT: It will be overruled. It's argument.

MS. RADOSTITS: Use your common sense. How about this Leestma character that they brought in? This guy has no notes, no report, no nothing, and he walks in

* * *

APPENDIX F

[1] STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE
COUNTY FOR THE EIGHTEENTH
JUDICIAL CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. PAMELA JACOBAZZI, Defendant.	No. 95 CF 1160 VOLUME 17 of 20 (Filed June 29, 2000)

REPORT OF PROCEEDINGS taken at the trial of the above-entitled cause, before the Honorable RONALD B. MEHLING, Judge of said Court, and a jury, Room 4012, on Friday, the 14th day of May A.D., 1999, at the hour of 9:40 a.m.

PRESENT:

MR. JOSEPH E. BIRKETT, State's Attorney
of DuPage County, by
MS. JANE E. RADOSTITS and
MS. KAREN M. MASTERS,
Assistant State's Attorneys,

appeared on behalf of The People of the State of Illinois;

MR. ANTHONY M. MONTEMURRO and
MR. RICHARD M. BUTERA,

appeared on behalf of the Defendant.

DEFENDANT PAMELA JACOBAZZI.
ALSO PRESENT: JANET HAYDEN,
Court Reporting Student

Lic. No. 084-003440

* * *

[89] MS. RADOSTITS: It has two different ages.

THE COURT: But I don't see your point, so I'm going to sustain the objection.

We have the certified one here. We'll use this one. This one says 6 WK to 12 YR.

MR. MONTEMURRO: Thank you, Judge.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

BY MS. RADOSTITS:

Q So you're only aware of one license then, is that right?

A Yes.

Q You're not aware of any other license issued by the Department of Children and Family Services in regards to you watching children?

A No.

Q Tell the ladies and gentlemen some of the classes that you take and that DCFS has offered you that enables you to watch children.

A The classes that are required are like pamphlets and books to read up on that the child – the Children and Family Services provide you with. Also there's special meetings that you can attend to that [90] also have child

development, and there's meetings that you can also attend.

Q Did you attend meetings?

A Yes.

Q Did you go to the classes?

A Some of them.

Q You received pamphlets in the mail from DCFS?

A Yes.

Q Did you read the pamphlets?

A Yes.

Q Some of the pamphlets said never shake a baby, didn't they?

A I don't recall that one, but yes, should have had one with –

Q Should have had one that said never shake a baby because you know –

A Right.

Q – that shaking a baby could inflict great bodily harm or death, right?

A Yes.

Q Now, DCFS, the organization that issued your license, they're also the organization that can take your license away, is that right?

A Yes.

* * *

APPENDIX G

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

BEFORE THE GRAND JURY OF
DU PAGE COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. PAMELA JACOBAZZI, Defendant.	)	No. 95 CF 1160-04-07

TESTIMONY OF JOSEPH LEONAS, taken before the Grand Jury of DuPage County, on Wednesday, the 14th day of May, A.D. 1997.

PRESENT:

MR. JOSEPH E. BIRKETT, State's Attorney of DuPage County, by
MS. KAREN MASTERS,
Assistant State's Attorney,

appeared on behalf of The People of the State of Illinois.

* * *

[62] that severe an injury. They weren't even school-aged kids.

THE JUROR: And now are they old enough to testify now, today, if they remembered anything happening or –

THE WITNESS: Well, there is no age limit to testify that I am aware of, but they are her kids and the other kids we weren't allowed to interview because the parents didn't want us to traumatize their children, the children that she was watching. I imagine that might be something that would come out at trial.

A JUROR: Why has it taken so long to come to a conclusion?

THE WITNESS: It is my understanding that the State's Attorney's Office just recently received a written confirmation from the doctors of what had happened.

A JUROR: I have a question for you, the State's Attorney's Office. Why are you seeking first degree murder charges rather than a lesser charge, and a related question, if we were to deny first degree murder charges, could you then seek lesser charges?

[63] MS. MASTERS: With regard to our choice of what to charge, we felt that based on the nature of the injuries, that this was the most appropriate charge. Now, if you were to return a no bill, I'm not quite sure how that affects the procedure, if I could come back and ask for something less.

THE JUROR: You don't know that?

MS. MASTERS: I mean, I suppose before you were to – I suppose I would like to know whether you were – if you required further testimony, I could do that.

THE JUROR: I'm asking that because I think maybe you – I think first degree murder is inappropriate because it requires intent and there isn't any proof

of intent, but some other charges might be more appropriate. That's why I bring it up. I couldn't support a first degree murder charge on this. I think it is the wrong charge, but obviously there is a crime.

THE WITNESS: I'm not going to argue –

MS. MASTERS: Well, if he's not asking you a question –

A JUROR: Is there any chance that the mother,

* * *

APPENDIX I

PARTICULAR TYPES OF EVIDENCE

3.11 Prior Inconsistent Statements

The believability of a witness may be challenged by evidence that on some former occasion he [(made a statement) (acted in a manner)] that was not consistent with his testimony in this case. Evidence of this kind [ordinarly] may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

[However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when

[1] the statement was made under oath at a [(trial) (hearing) (proceeding)].

[or]

[2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of;

and

[a] the statement was written or signed by the witness.

[or]

[b] the witness acknowledged under oath that he made the statement.

[or]

[c] the statement was accurately recorded by a tape recorder, videotape, recording, or a similar electronic means of sound recording.]

It is for you to determine [whether the witness made the earlier statement, and, if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made.